

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

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|--------------------------|---|------------------------|
| UNITED STATES OF AMERICA |) | DOCKET NO. 3:22-CR-157 |
| |) | |
| vs. |) | VOLUME II - REDACTED |
| |) | |
| DAVID TATUM, |) | |
| |) | |
| Defendant. |) | |
| |) | |

TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE KENNETH D. BELL
UNITED STATES DISTRICT COURT JUDGE
MAY 3, 2023

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P R O C E E D I N G S

WEDNESDAY MORNING, MAY 3, 2023

(Court called to order at 8:58 AM.)

(Jury not present.)

THE COURT: Good morning, all.

ALL COUNSEL: Good morning, Your Honor.

THE COURT: Are the jurors here, Meg?

THE CLERK: Yes, sir.

THE COURT: Are we ready for the jury?

MR. ODULIO: Your Honor, we have one housekeeping matter we would like to bring to the Court's attention.

THE COURT: All right.

MR. ODULIO: Your Honor, in the 404 filing that the government submitted and the Court ruled on, with respect to the proposed witness E.S. in our factual description in the filing, we indicated that E.S. was the person who was videotaped in the bathroom. This is the second bathroom video.

THE COURT: Right.

MR. ODULIO: In trial preparation we learned that E.S. was not the person videotaped. It was another cousin. I don't think this would operate to affect any other part of the Court's ruling with respect to E.S.'s proposed testimony. It's just going to be what we outlined in our proffer -- or in the motion. That's unchanged. But she is going to testify

1 that "that is my cousin K.C. on that video."

2 So we just wanted to give that to the Court.

3 Obviously, we alerted counsel to that. I don't -- I can't
4 conceive how that would operate to impact the Court's 404
5 analysis, but didn't want to presume that so wanted to raise
6 it.

7 THE COURT: And so her testimony is going to be that
8 she confronted Mr. Tatum about that incident and he made some
9 sort of admission with respect to it.

10 MR. ODULIO: No, Your Honor. That testimony is
11 going to be the same, but that videotape was relating to
12 Ms. E.S. when she was 15 years old. The part that I'm
13 clarifying is the second bathroom video that was played
14 yesterday in the cabin in Maine was not E.S.. It was her
15 cousin K.C.. So --

16 THE COURT: Is there any testimony upcoming with
17 respect to that second video?

18 MR. ODULIO: The second bathroom video?

19 THE COURT: Yes.

20 MR. ODULIO: Yes, that will be Ms. E.S.. And she
21 will identify her cousin K.C. and identify the bathroom and
22 identify the defendant. And then the second part of her
23 testimony will be, "Hey, I confronted the defendant about a
24 video he made of me when I was a child." And, again, that
25 will -- is in line with what's reflected in our pleading.

1 THE COURT: Okay. I see.

2 Mr. Ames, do you want to be heard on that?

3 MR. AMES: Your Honor, yeah. I guess it's my
4 understanding the distinction is that when the government was
5 under the impression that this was E.S. in this other video,
6 presumably the testimony would have been that's me and this
7 happened and establish -- corroborating that. And now the
8 testimony, I guess (inaudible).

9 THE COURT REPORTER: I'm sorry, Mr. Ames, will you
10 pull your microphone a little bit closer.

11 MR. AMES: Oh, I'm sorry.

12 Just to make sure I have that correct is that her
13 initial -- originally the testimony presumably would have been
14 related to identifying herself in a video and recounting a
15 prior conversation with Mr. Tatum. Today what will now be
16 presumably the testimony is reviewing this other video that
17 isn't her and recounting a conversation. Is that --

18 THE COURT: And apparently identifying the person in
19 the video.

20 MR. AMES: Identifying the person in the video.
21 Okay, yeah. I guess, Your Honor, as far as the 404 is
22 concerned, I guess I would agree it doesn't change in any
23 particular way the analysis there of whether or not that's
24 relevant, her speaking about one video versus another.

25 THE COURT: The Court agrees and appreciates you

1 clarifying that for me.

2 MR. ODULIO: One last thing, Your Honor. We did
3 agree overnight on a proposed jury instruction. That's been
4 filed with the Court and emailed to your clerk.

5 THE COURT: I pulled it up as I was walking down.
6 I'll try to find time this morning to read it.

7 MR. AMES: Yes, Your Honor. And if we can address
8 that. I would like to be heard briefly on it just because I
9 don't think that the Fourth Circuit has specifically addressed
10 the issue; but we've cited, I think, all the case law from any
11 circuit we could find, which is a total of four on the issue
12 of the underlying image of the explicit conduct, whether
13 there's a requirement of being minor versus adult, which I
14 believe Mr. Odulio cited all of those as well in the proposal.

15 THE COURT: Okay. Well, either during the morning
16 break or the lunch break. By then I will have had a chance to
17 read it and we can talk about it some more.

18 MR. AMES: Thank you, Your Honor.

19 THE COURT: Bring the jury, please.

20 MR. ODULIO: Your Honor, can we bring the witness in
21 too?

22 THE COURT: Yes.

23 (Witness resumed the witness stand.)

24 (Jury entered the courtroom.)

25 THE COURT: Good morning and welcome back. I trust

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1 you withstood the inquisitive last night and abided by the
2 Court's instructions.

3 It may look like we're late, but nobody was late.
4 We were just taking up some things that didn't have anything
5 to do with your deliberations.

6 You may continue your examination.

7 MR. CERVANTES: Thank you, Your Honor.

8 JASON WHITT, GOVERNMENT WITNESS, PREVIOUSLY SWORN,

9 DIRECT EXAMINATION (Cont'd.)

10 BY MR. CERVANTES:

11 Q. Good morning, Mr. Whitt.

12 A. Good morning.

13 Q. When we were last talking yesterday, we were about to get
14 into a new device.

15 A. Yes, sir.

16 Q. Would you please hold up for the jury Exhibit 4, the
17 thumb drive.

18 (Witness complied.)

19 THE COURT: I believe that's 4A.

20 MR. CERVANTES: 4A. Thank you, Your Honor.

21 Q. Thank you.

22 Is there any indication on the outside of the device that
23 would inform you on whether the device was shipped or
24 transported in interstate or foreign commerce?

25 A. The only thing on the outside of the device is there is a

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1 marking for the "Medical College of Wisconsin." And on the
2 other side there is a "Department of Psychiatry." There's no
3 markings as to where it was manufactured.

4 Q. I'm showing you what has been marked for identification
5 as Government's Exhibits 4B and 4C.

6 Do these -- do you recognize these pictures?

7 A. I do.

8 Q. Do these -- what is it?

9 A. It is the thumb drive with the markings of "Medical
10 College of Wisconsin" and the other one is "Department of
11 Psychiatry."

12 MR. CERVANTES: The government moves 4B and 4C into
13 evidence.

14 THE COURT: They're admitted.

15 (Government's Exhibits Nos. 4B and 4C were received
16 into evidence.)

17 Q. Did you flag images of child pornography on this thumb
18 drive?

19 A. I did.

20 Q. Were those images organized in any particular way?

21 A. The images were in folders, different folders.

22 Q. Okay. And what kind of images of child pornography did
23 you find?

24 A. So the images of child pornography that I found on here,
25 they are going to be altered or modified from an original

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1 image or a source image. And then you'll see the images where
2 they were modified or altered to appear -- or to be child
3 pornography.

4 Q. I'm showing you what has been marked for identification
5 as 4D.

6 Do you recognize it?

7 A. I do.

8 Q. What is it?

9 A. So this is a screenshot of four folders inside the thumb
10 drive.

11 MR. CERVANTES: The government moves 4D in evidence.

12 THE COURT: It's admitted.

13 (Government's Exhibit Number 4D was received into
14 evidence.)

15 Q. So let's talk about what you found. First of all, if you
16 can just talk a little bit about the folder path. So if
17 someone were to insert this thumb drive into the MacBook, how
18 is it that they would get to this screen?

19 A. So if you inserted this thumb drive into a MacBook, you
20 would see -- it would give it a letter or a volume. So you
21 would see the letter H or the volume mounted as USB disk
22 depending on which system you plugged it into.

23 Inside of that you would click on the folder MCW2, and
24 then it would open up more folders. Then you would find the
25 folder PCS_files. Then inside that folder you would find

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1 Sample. And inside that folder you would look for MGNweb,
2 w-e-b. And then inside of that folder you would see these
3 four folders.

4 Q. All right. So we're going to talk about three of these
5 folders. First we're going to talk about the CPT, then we're
6 going to talk about the SSV, and then we'll talk about the
7 EMOR. Okay?

8 A. Yes, sir.

9 Q. I'm showing you what has been marked for identification
10 as Government's Exhibit 4E1.

11 What is that?

12 A. This is a screenshot of the CPT folder.

13 MR. CERVANTES: Government moves 4E1 in evidence.

14 THE COURT: Admitted.

15 (Government's Exhibit Number 4E1 was received into
16 evidence.)

17 Q. Okay. Can you describe what we're looking at here.

18 A. So inside of here there's 24 images. There are going to
19 be original images that I will reference to as original or
20 source images. And then you're going to see images of the
21 original that have been altered to be child pornography.

22 Q. So are there -- you're saying that there are pairs?

23 A. There are pairs.

24 Q. So I'm pulling up a pair of pictures. Do you agree that
25 this is a set?

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- 1 A. I do.
- 2 Q. Which one -- you said that they were original and then
3 modified.
- 4 A. Correct.
- 5 Q. The original being the one on the left and the modified
6 on the right?
- 7 A. Correct.
- 8 Q. Pulling up another. Is this a pair?
- 9 A. Yes, sir.
- 10 Q. Is this a pair?
- 11 A. Yes, sir.
- 12 Q. Is this a pair?
- 13 A. So the image on the right and the image on the far left
14 in the left box are a pair.
- 15 Q. And the image --
- 16 A. The image on -- I'm sorry.
- 17 Q. -- that I've circled in red?
- 18 A. So that image appears to be cropped from the image on the
19 left in the left-hand box.
- 20 Q. Is this a pair?
- 21 A. Yes, sir, it is.
- 22 Q. Is this a pair?
- 23 A. Yes, sir.
- 24 Q. Is this a pair?
- 25 A. Yes, sir.

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1 Q. Is this a pair?

2 A. Yes, sir.

3 Q. Now, I'd like to draw your attention to the bottom right
4 of this picture. What do you see there?

5 A. So it is a watermark or a banner for Teen Gallery. At
6 the bottom I believe it's .com.

7 Q. Did you find the -- any originals from these three that
8 I've pulled up?

9 A. Yes, sir, I did.

10 Q. In this folder?

11 A. No, sir.

12 Q. I'm showing you what has been marked for identification
13 as Government's Exhibit 8.

14 Do you recognize that?

15 A. I do.

16 Q. What is it?

17 A. It is a screen shop -- screenshot of the website
18 deepsukebe.io/en.

19 MR. CERVANTES: The government moves Exhibit 8 into
20 evidence.

21 THE COURT: It's admitted.

22 (Government's Exhibit Number 8 was received into
23 evidence.)

24 Q. Why did you take this screenshot?

25 A. So Special Agent Brown advised me that some of these

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1 images may be altered by this website.

2 Q. Okay. And did you find evidence that some of the
3 pictures we just looked at had indicia of being modified by
4 this website?

5 A. I did.

6 Q. I'm going to pull up the last exhibit that we were just
7 looking at and I'm going to zoom in on one of the pictures.

8 Is there something about this picture that catches your
9 eye?

10 A. There is.

11 Q. What is it?

12 A. So if you look at the top of the picture on the left, you
13 will see the magenta or pink banner on the top and bottom, but
14 also the middle of the picture where you see the white bar to
15 show what is selected on the website appears to be consistent
16 with the website itself.

17 Q. Zooming into another picture, is your testimony the same
18 about that picture?

19 A. Yes, sir, it is.

20 Q. Next I'd like to talk to you about the contents of the
21 SSV folder.

22 I'm showing you what has been marked for identification
23 as Government 4G1.

24 Do you recognize it?

25 A. I do.

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1 Q. What is it?

2 A. It is a screenshot of some of the files in -- or some of
3 the files in the folder SSV.

4 Q. I'm going to show you two more and then ask to move these
5 in. One second.

6 Government's Exhibit 4G2, what is that?

7 A. It is a screenshot of some of the other files in the
8 folder SSV.

9 Q. Third one, 4G3. Do you recognize that?

10 A. Yes, sir. It's a screenshot of the files -- the
11 remaining files in the folder of SSV.

12 MR. CERVANTES: Government moves 4G1, 4G2, and 4G3
13 in evidence.

14 THE COURT: They're admitted.

15 (Government's Exhibits Nos. 4G1, 4G2, and 4G3 were
16 received into evidence.)

17 Q. Starting with 4G1, what are we looking at here?

18 A. Some of these are -- these are the first files that are
19 in the folder of SSV.

20 Q. Did you identify some of the unmodified pictures that we
21 just looked at in this folder?

22 A. I did.

23 Q. Is this one?

24 A. Yes, sir.

25 Q. Is this another one?

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- 1 A. Yes, sir.
- 2 Q. Are these two more?
- 3 A. Yes, sir.
- 4 Q. The remaining pictures here that I have not called your
5 attention to, did you find that those were modified?
- 6 A. I did not.
- 7 Q. Pulling up 4G2, did you find any of the modified pictures
8 in their unmodified form in this folder?
- 9 A. I did.
- 10 Q. Is this one?
- 11 A. Yes, sir.
- 12 Q. Is this another one?
- 13 A. Yes, sir.
- 14 Q. Is this another one?
- 15 A. Yes, sir.
- 16 Q. How about this one?
- 17 A. Yes, sir.
- 18 Q. And this one?
- 19 A. Yes, sir.
- 20 Q. Showing you 4G3. Same questions.
21 Is this one?
- 22 A. It is.
- 23 Q. At the bottom of this picture, do we see the same water
24 stamp for Teen Gallery?
- 25 A. Yes, sir, we do.

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1 Q. Is this another one?

2 A. It is.

3 Q. Same issue with the watermark?

4 A. Yes, sir.

5 Q. Is this another one?

6 A. Yes, sir.

7 Q. How about the watermark?

8 A. Same, Teen Gallery.

9 Q. And I just want to go back and double check.

10 4G2, is there a watermark on this picture?

11 A. Yes, sir.

12 Q. Do you need me to zoom in closer?

13 A. There is a watermark. Appears to be Teen Gallery, yes,
14 sir.

15 Q. Next I want to talk about the contents of the EMOR
16 folder.

17 I'm showing you what has been marked for identification
18 as 4F1.

19 Do you recognize it?

20 A. I do.

21 Q. What is it?

22 A. It is the contents or the files inside the EMOR file,
23 4F1.

24 MR. CERVANTES: The government moves 4F1 in
25 evidence.

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1 THE COURT: It's admitted.

2 (Government's Exhibit Number 4F1 was received into
3 evidence.)

4 Q. What are we looking at here?

5 A. Again, what we're looking at here is source folders or
6 source files and then those files being altered or modified.

7 Q. So I'm going to take a couple minutes just to zoom into a
8 few pictures.

9 So I've zoomed in on several of the pictures in there.
10 Do you recognize these to be similar or sets?

11 A. Yes, sir.

12 Q. I'm going to zoom in on another set of pictures.

13 Do you recognize these to be sets?

14 A. I do. Minus the one female on the far left is cut out of
15 the one on the right.

16 Q. Yesterday I asked you questions about attribution.

17 A. Yes, sir.

18 Q. Did you look for attribution in the thumb drive?

19 A. I did.

20 Q. I'm showing you what has been marked for identification
21 as Government's Exhibits 4H1 through 4H4.

22 Do you recognize them?

23 A. I do.

24 Q. Did these pictures come from the thumb drive?

25 A. They did.

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1 MR. CERVANTES: Government moves 4H1 through 4H4 in
2 evidence.

3 THE COURT: They're admitted.

4 (Government's Exhibits Nos. 4H1, 4H2, 4H3, and 4H4
5 were received into evidence.)

6 Q. I'm going to show you one more that I couldn't fit on the
7 screen.

8 Do you recognize this one?

9 A. I do.

10 Q. Did this come from the thumb drive?

11 A. It did.

12 Q. 4H5.

13 MR. CERVANTES: Government moves 4H5 in evidence.

14 THE COURT: It's admitted.

15 (Government's Exhibit Number 4H5 was received into
16 evidence.)

17 Q. Showing you what has been marked for identification as
18 Government's Exhibit 4H6.

19 Do you recognize this?

20 A. I do.

21 Q. Did this document come from the thumb drive?

22 A. Yes, sir.

23 MR. CERVANTES: Government moves 4H6 in evidence.

24 THE COURT: It's admitted.

25 (Government's Exhibit Number 4H6 was received into

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1 evidence.)

2 Q. What does this letter appear to be to you?

3 A. It's a letter addressed to a Dr. David Arthur Tatum from
4 Wake Forest University, Department of Psychiatry and
5 Behavioral Medicine.

6 Q. Okay. Last device. Can you hold up the MacBook, please.

7 (Witness complied.)

8 Q. And that's marked as Government's Exhibit 5A?

9 A. Yes, it is.

10 Q. Is there any indication on the outside of the device that
11 would inform you on whether the device was shipped or
12 transported in interstate or foreign commerce?

13 A. Yes, sir.

14 Q. Showing you what has been marked for identification as
15 Government's Exhibit 5B.

16 Do you recognize it?

17 A. I do.

18 Q. What is it?

19 A. It is the back of the MacBook describing where it's
20 assembled and designed by and also contains the serial number.

21 Q. Where is it designed and assembled?

22 A. Designed by Apple in California and assembled in China.

23 MR. CERVANTES: Government moves 5B in evidence.

24 THE COURT: It's admitted.

25 (Government's Exhibit Number 5B was received into

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1 evidence.)

2 Q. All right. What are user profiles?

3 A. So user profiles, when you have a computer, when you
4 first log in or when you open it up, you can create your own
5 user profile. It just allows you to have multiple users on a
6 computer that you can separate yourself or your information.
7 But a user profile is a profile you create or somebody creates
8 for you on a computer.

9 Q. Did you find multiple user profiles on the MacBook?

10 A. I did.

11 Q. To what extent did that impact your search?

12 A. User profiles do not impact my search.

13 Q. Can you explain.

14 A. So when we go into a computer, we talked about index
15 searches. When I first run an index search or I go in and
16 look for videos or images of child pornography, I don't look
17 what user generated them or where it's stored at first. I run
18 the index search and then I go wherever the evidence leads me.

19 Q. And afterwards can you then see what user profile is
20 associated with the piece of evidence that you found?

21 A. Yes, sir. Once they are flagged we'll go through and
22 then once we get the folder path, we will see what user they
23 are stored under.

24 Q. Did you find information in the MacBook that it was used
25 to access child pornography?

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1 A. I did.

2 Q. What user profiles were associated with that evidence?

3 A. So there was two, a David Tatum and a Morphus.

4 Q. Is that the same -- spelled in the same way as the
5 Morphus that we discussed yesterday from the iPhone?

6 A. Yes, sir, it was.

7 Q. Just to be sure, pulling up Government's Exhibit 2I
8 that's already in evidence. Can you remind the jury what this
9 is.

10 A. So this is the details of the owner information for the
11 iPhone 6.

12 Q. Okay. And when you discussed Morphus, is it the same
13 spelling that you see here in the Apple ID?

14 A. Yes, sir.

15 Q. All right. Previously we looked at evidence and then we
16 talked about attribution, but for this device we're going to
17 do it backwards. We're going to talk about attribution first,
18 okay?

19 A. Yes, sir.

20 Q. Did you find any attribution in the MacBook?

21 A. I did.

22 Q. Showing you what has been marked for identification as
23 Government's Exhibit 5F.

24 What is that?

25 A. It is a document from the MacBook.

JASON WHITT - DIRECT

1 MR. CERVANTES: Government moves 5F in evidence.

2 THE COURT: Admitted.

3 (Government's Exhibit Number 5F was received into
4 evidence.)

5 Q. Can you -- can you read the top of the document.

6 A. The top of the document. "David Arthur Tatum, D.O.,
7 13021 Pumpkin Way Drive, Mint Hill, North Carolina 28227."

8 Q. Okay. What does this document purport to be?

9 A. Appears to be a resume.

10 Q. I'm going to move this over and bring back 2I that we
11 were just looking at.

12 On this resume, what's the phone number that Dr. Tatum
13 lists on his resume?

14 A. The phone number is (315)447-4594.

15 Q. And what is the phone number associated with the iPhone
16 that we previously discussed that you said was used to record
17 the two bathroom videos and the up-skirt videos?

18 A. The device's phone number recorded is 1(315)447-4594.

19 Q. I'm showing you what has been marked for identification
20 as Government's Exhibit 5G.

21 Do you recognize this?

22 A. I do.

23 Q. What is it?

24 A. This is a screenshot from the AXIOM Magnet forensic
25 software reference to a user on the MacBook.

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1 MR. CERVANTES: Government moves 5G in evidence.

2 THE COURT: It's admitted.

3 (Government's Exhibit Number 5G was received into
4 evidence.)

5 Q. I'm highlighting the top part of the artifact
6 information. What is the user name associated?

7 A. The user name is davidtatum, one word.

8 Q. And the full name?

9 A. The full name is David Tatum.

10 Q. Is there a way to determine whether the thumb drive or
11 the My Passport -- can you hold up both of those.

12 A. This is the thumb drive and the My Passport.

13 Q. Is there a way to determine whether either of those
14 devices were plugged into the MacBook?

15 A. There are.

16 Q. Can you describe, what are thumbnails?

17 A. So thumbnails -- when you plug in a device into your
18 computer, whether, again, it's a Mac or a Windows, you can --
19 the computer itself will go out, look at the files and create
20 a thumbnail from it and put it into a thumbnail cache so that
21 whenever you plug the drive back in, it can access these
22 thumbnails faster so it won't slow down your computer.

23 Q. So in trying to determine whether one of these devices
24 was plugged into the Mac, what do you do?

25 A. So in this we will look for common, like, file paths. We

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1 will also look for folders that we saw on another drive. We
2 will also do an index search.

3 Q. This morning we talked about the folder path, for
4 example, to those folders that have the CPT, the SSV, and the
5 EMOR. Would you be able to look for that folder path in the
6 Mac?

7 A. Yes, through an index search, yes, sir.

8 Q. Okay. So let's -- I'm going to move in some exhibits and
9 then compare them to some exhibits we've already talked about,
10 okay?

11 A. Yes.

12 Q. So I'm going to show you what's been marked as
13 Government's Exhibit 5 -- I'm sorry, 4E5.

14 What is that?

15 A. It is a screenshot for the details for the -- or from the
16 MacBook.

17 Q. Okay. For an image?

18 A. For a thumbnail, yes, sir.

19 MR. CERVANTES: Government moves 4E5 in evidence.

20 THE COURT: It's admitted.

21 (Government's Exhibit Number 4E5 was received into
22 evidence.)

23 Q. I'm going to show you two more before publishing to the
24 jury, okay?

25 I'm showing you what's been marked for identification as

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1 4F9.

2 Do you recognize that?

3 A. I do.

4 Q. What is it?

5 A. It is a screenshot from the Magnet AXIOM forensic
6 software for the details of a thumbnail.

7 MR. CERVANTES: Government moves 4F9 in evidence.

8 THE COURT: It's admitted.

9 (Government's Exhibit Number 4F9 was received into
10 evidence.)

11 Q. Showing you 4F13.

12 What is that?

13 A. It is a screenshot from the Magnet AXIOM software for the
14 details of a thumbnail.

15 MR. CERVANTES: Government moves 4F13 in evidence.

16 THE COURT: It's admitted.

17 (Government's Exhibit Number 4F13 was received into
18 evidence.)

19 Q. All right. So I am showing you Government's Exhibit 4D
20 that's been admitted in evidence. Can you remind us what this
21 is.

22 A. So this is the -- how you would get to these folders.

23 When you plug in the thumb drive, you would see the MCW2

24 folder, the PCS_files folder, the Sample folder, and the

25 MGNweb folder. And inside that folder you would see the four

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1 listed folders.

2 Q. All right. So I'm going to move this over and then we're
3 going to talk about some other exhibits, okay?

4 4E5. What is 4E5?

5 A. 4E5 is the screenshot for the Magnet AXIOM forensic
6 software for the details of that thumbnail.

7 Q. Where? On the MacBook?

8 A. From the MacBook.

9 Q. Okay. So the image on the right is from the MacBook.
10 The image on the left is from the thumbnail -- the thumb
11 drive.

12 A. Correct.

13 Q. Can you tell on Government's Exhibit 4E5, the one on the
14 right, what the folder path is?

15 A. I can.

16 Q. What is it?

17 A. So the folder path that lists thumbnails associated to it
18 is from Volumes, USB disk, MCW2, folder PCS_files, folder
19 Sample, folder MGNweb, w-e-b, folder CPT.

20 Q. Is that the same folder path in the thumb drive for the
21 CPT folder?

22 A. It is.

23 Q. I'm showing you 4F9.

24 Can you tell us what we're looking at here.

25 A. It is the Magnet AXIOM forensic software details for this

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1 thumbnail for the MacBook.

2 Q. And the thumbnail being depicted at the top?

3 A. The thumbnail being depicted at the top, yes, sir.

4 Q. So the same -- is your testimony the same about where
5 this is coming from, the MacBook?

6 A. Yes, sir.

7 Q. What is the folder path for this thumbnail?

8 A. The folder path for this thumbnail is Volumes, USB disk,
9 MCW2, which is where the folder would start, PCS_files, folder
10 Sample, folder MGNweb, folder EMOR.

11 Q. Is this the same folder path as the thumb drive for the
12 EMOR folder?

13 A. Yes, sir.

14 Q. Showing you 4F13.

15 What is this?

16 A. This is a screenshot from the Magnet AXIOM forensic
17 program for the thumbnail shown at the top from the MacBook.

18 Q. What is the folder path to this thumbnail?

19 A. The folder path for this folder is USB disk, MCW2,
20 PCS_files, folder Sample, folder MGNweb, w-e-b, folder EMOR.

21 Q. Is that the same folder path as the folder path in the
22 thumb drive for the EMOR folder?

23 A. It is.

24 Q. So does the -- do the last three metadata exhibits that
25 we were just talking about, 4E5, 4F9, and 4F13, 4F13 being the

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1 one that's depicted, do they give you a last access date
2 information?

3 A. It does.

4 Q. What does that mean?

5 A. For the last access date for this is when the thumb drive
6 was plugged in and the MacBook actually saw these files. So
7 it records the last access date of these thumbnails.

8 Q. And what is the last access date for -- that's depicted
9 here for the thumbnail in 4F13?

10 A. 9/18/2021.

11 Q. Based on this information, can you tell the jury the last
12 time that this MacBook was accessed -- this MacBook accessed
13 the folder in the thumbnail.

14 A. So the last time that the MacBook accessed the thumbnail
15 would be 9/18/2021.

16 Q. And in your opinion, can you tell whether that last
17 access is last accessed into the thumbnail -- the thumb drive
18 that's been admitted as Government's Exhibit 4A?

19 A. Yes. You would have to plug in the thumb drive for the
20 MacBook to actually access it.

21 Q. Next let's talk about whether you found any evidence that
22 the My Passport was plugged into the MacBook.

23 A. Yes, sir.

24 Q. We're going to talk about the bathroom -- the first
25 bathroom video.

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1 Did you find evidence that the first bathroom video was
2 plugged into -- that the My Passport was plugged into the
3 MacBook and the folder where the first bathroom video is
4 located was accessed?

5 A. I did.

6 Q. We're going to break that down in a moment, okay?

7 A. Yes, sir.

8 Q. Showing you what has been marked for identification as
9 Government's Exhibit 5K.

10 Do you recognize it?

11 A. I do.

12 Q. What is it?

13 A. This is a screenshot for the -- for a thumbnail located
14 on the MacBook.

15 MR. CERVANTES: Government moves 5K in evidence.

16 THE COURT: It's admitted.

17 (Government's Exhibit Number 5K was received into
18 evidence.)

19 Q. Can you explain to the jury what we're looking at here.

20 A. So what we're looking at here is the thumbnail for a file
21 IMG_3666.MOV and the details that the Magnet AXIOM forensic
22 software pulled for it.

23 Q. From this information can you tell whether the My
24 Passport was plugged into the MacBook to access the bathroom
25 video, the first bathroom video?

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1 A. Yes, sir.

2 Q. And what is that information?

3 A. So if you look at the folder path from where the movie or
4 the file was accessed from.

5 Q. What does that tell you?

6 A. It tells me from the Volumes/My Passport/User
7 Manuals/KOR/Dartmouth/Downloads/Modules is where the file was
8 accessed from, which is consistent with the My Passport.

9 Q. Was the bathroom video saved in the folder marked
10 Modules?

11 A. Yes.

12 Q. Was the second bathroom video also saved in the Modules
13 folder?

14 A. Yes, sir.

15 Q. Showing you what has been marked for identification as
16 Government's Exhibit 5L.

17 Do you recognize that?

18 A. I do.

19 Q. What is it?

20 A. It is a screenshot of the thumbnail from the Magnet AXIOM
21 forensic software for the details of that thumbnail.

22 MR. CERVANTES: Government moves 5L in evidence.

23 THE COURT: Admitted.

24 (Government's Exhibit Number 5L was received into
25 evidence.)

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1 Q. Can you describe what we're looking at here for the jury.

2 A. At the top part you are seeing a thumbnail for the file
3 IMG_3696. And also the folder path is above it which is
4 Volumes/My Passport/User Manuals/KOR/Dartmouth/Downloads,
5 folder Modules.

6 Q. Is this the same folder path you just described for the
7 first bathroom video?

8 A. Yes, sir.

9 Q. From this information can you tell whether the My
10 Passport was plugged into the MacBook to access the second
11 bathroom video?

12 A. Yes, sir.

13 Q. And was it?

14 A. It was.

15 Q. What is the last accessed date for this thumbnail?

16 A. The thumbnail last accessed date is 9/10/2021.

17 Q. Showing you what has been marked for identification as
18 Government's Exhibit 5H.

19 Do you recognize this?

20 A. I do.

21 Q. What is it?

22 A. It is a screenshot of the details for a thumbnail located
23 on the MacBook from the Magnet AXIOM forensic software.

24 MR. CERVANTES: Government moves 5H in evidence.

25 THE COURT: Admitted.

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1 (Government's Exhibit Number 5H was received into
2 evidence.)

3 Q. Can you explain to the jury what this is.

4 A. So on the top portion you will see a thumbnail of a video
5 from IMG_1089.MOV, and the folder path is Volumes/My
6 Passport/User Manuals/KOR/Dartmouth/Downloads, folder Modules.

7 Q. Is this one of the up-skirt videos we saw yesterday?

8 A. It is.

9 Q. Is this the same folder path for both of the bathroom
10 videos?

11 A. Yes, sir, it is.

12 Q. Have you reviewed the folder path for the other two
13 videos -- the other two up-skirt videos?

14 A. I have.

15 Q. And is the folder path the same for those?

16 A. Yes, sir, it is.

17 Q. Is there any significance to the fact that the two
18 bathroom videos and the three videos of the patient all have
19 the same folder path?

20 A. They were all stored in the same folder so that's where
21 they were saved to or put into.

22 Q. We talked about index searches. You've mentioned that a
23 couple times. Can you just briefly touch on what that is.

24 A. So an index search is when our forensic software sees a
25 forensic image, it goes out and creates, like, a log of all

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1 the, like, strings of letters and numbers so that -- and it
2 puts it into a list so that when you run an index search, they
3 can be accessed faster.

4 Q. Did you search for pthc in the MacBook?

5 A. I did.

6 Q. Did you get any hits?

7 A. I did.

8 Q. Showing you what's been marked for identification as
9 Government's Exhibit 5C.

10 What is that?

11 A. This is the first page of the hits of pthc that we
12 exported.

13 Q. How many hits were exported?

14 A. 1,118.

15 MR. CERVANTES: Government moves 5C in evidence.

16 THE WITNESS: It's admitted.

17 (Government's Exhibit Number 5C was received into
18 evidence.)

19 MR. AMES: Your Honor, I know I have a standing
20 objection, but in particular with this, I just wanted to make
21 it clear that I'm objecting to hearsay, foundation, and
22 otherwise as before.

23 THE COURT: Understood. Overruled.

24 Q. What do each of these rows represent?

25 A. So each row is one hit for the term of pthc.

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1 Q. If we looked at any one of the rows in this document that
2 you said a moment ago has 1,118 rows, do they all have the
3 phrase pthc?

4 A. Yes, sir.

5 Q. Where are these coming from?

6 A. These are coming from a QuickLook database to where a
7 volume was plugged in. And what a QuickLook does is it goes
8 out into -- just like the thumbnail cache, it goes out and
9 sees when you plug it in, it makes a record of each file that
10 is located in the drive; and that's where you get the
11 QuickLook thumbnail cache from.

12 Q. So this list, this information is stored in the MacBook?

13 A. Correct.

14 Q. Do you have any doubt that there was a device that was
15 plugged into the Mac that had files with those names in it?

16 A. No, sir.

17 Q. If there wasn't a device that had those files in it and
18 was connected to the MacBook, is there any other possible way
19 that these hits could have been found on the MacBook?

20 A. No, sir, not to my knowledge.

21 Q. I'd like to highlight three of the rows, 18 -- I'm sorry,
22 8, 13, and 30. Would you please read each one of these.

23 A. 8, "[PTHC]6yo girl gets fucked with legs in the
24 air(1).JPG"; 13, "[PTHC]8yo pussy pedo fuck-screwtop
25 style!!.jpg"; and 30, "[PTHC]Daddy fucks my 4yo cunt for first

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1 time(1).jpg."

2 Q. Based on your training and experience, you said you've
3 reviewed over a hundred thousand files?

4 A. Yes.

5 Q. Does this naming convention for these files, is it
6 consistent with files you have previously reviewed as child
7 pornography?

8 A. Yes.

9 Q. What does the y-o after each one of these numbers stand
10 for?

11 A. So y-o usually stands for years of age or years old.

12 Q. What does pedo stand for?

13 A. Pedophilia, pedophile.

14 Q. Just to make sure that the document has all the pages
15 that we had discussed, I am going to -- or the rows, I'm going
16 to zoom to the -- or fast forward to the last page.

17 Can you confirm that 1,118 is the last row?

18 A. Yes, sir.

19 Q. PLIST file, what is that?

20 A. A PLIST file is a properties list file that records
21 information of the user or information from the application
22 and stores it in the PLIST file. So whenever you access that
23 application, it has your user settings or data about the
24 application already saved.

25 Q. Did you find a PLIST file in the MacBook related to

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1 recently played videos?

2 A. I did.

3 Q. Showing you what has been marked for identification as
4 Government's Exhibit 5D.

5 What is that?

6 A. So this is a screenshot from the Magnet AXIOM forensic
7 software from the VLC PLIST.

8 MR. CERVANTES: Government moves 5D in evidence.

9 THE COURT: Admitted.

10 (Government's Exhibit Number 5D was received into
11 evidence.)

12 Q. Let's talk about time frame for a moment before we get
13 into the content of this.

14 Does this PLIST contain any information about when these
15 files were played?

16 A. No, it does not.

17 Q. Does it have information about when it was first run?

18 A. Yes, it does.

19 Q. Okay. And can you describe what that is. What does that
20 mean?

21 A. So inside the PLIST there are fields where it lists
22 certain dates that the programmers of VLC decided to record.
23 In this one you'll see VLCFirstRun, one word, and a date of
24 8/6/2019.

25 Q. What does that tell you, if anything, about these videos?

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1 A. That these videos were either played on or after
2 8/6/2019.

3 Q. So the information doesn't tell you specifically when
4 each video was played, but it does give you at least a range
5 of when they were played.

6 A. Yes, sir.

7 Q. And that range being what?

8 A. The date that it was first run to the date that it was
9 seized.

10 Q. Okay. So between August 6, 2019, to September 22, 2021?

11 A. Yes, sir.

12 Q. I'm going to focus on a couple rows here.

13 Row 19. Can you describe what we're looking at here and
14 what does this row tell you?

15 A. So what you're looking at here is an entry into the
16 recently played media or the VLC PLIST. This is a row that
17 signifies which file was played. Where you see file and the
18 colon, and then it lists out the folder path and file name
19 that was accessed by VLC.

20 Q. I'm highlighting the word Lolita. Previously --
21 yesterday you testified about Lolita?

22 A. Lolita is a common search term that I use to find
23 evidence of child pornography.

24 Q. Why?

25 A. It's always associated with it. I don't know exactly

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1 what it means. But we always search for Lolita, pthc, pedo,
2 those type of words.

3 Q. What does this tell you about where it was played from?

4 A. So it was played from the Volumes/My Book/Data --

5 Q. Well, what does it tell you about what device it was
6 played from?

7 A. So it was played from a My Book, which My Book is a
8 Western Digital external device.

9 Q. If row 19 is also listed in that document we just looked
10 at with 1,118 file names that have pthc in it, what would that
11 mean to you?

12 A. That this was located on the My Book and also played
13 through the VLC program.

14 Q. So let's see if row 19 is on that list that we just
15 looked at.

16 So I'm going to scroll to page 4 of this document. I'm
17 going to draw your attention to row 96.

18 Is the file that was played that's described in row 19,
19 the blowout that's in the top, is it listed in the document
20 with 1,118 file names in it?

21 A. Yes, sir.

22 Q. So what does that mean to you?

23 A. That this device was connected to the MacBook and viewed
24 through the VLC program.

25 Q. I'm going to try two more. Row 7 from Exhibit 5D. I'm

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1 going to go to page 16 in Exhibit 5D, row 450.

2 Can you read the name of the file in 450.

3 A. "Vicky String Bikini Pthc 11Yo Pedofilia.mpg."

4 Q. Does Vicky have any significance to you?

5 A. So Vicky is a very common name for investigations into
6 child pornography. It's a very common known victim. You'll
7 see Vicky's name in a lot of the child exploitation cases that
8 I work.

9 Q. And is this particular file, is it also listed in the
10 PLIST?

11 A. It is listed in the PLIST, yes, sir.

12 Q. So just to be clear, I'm highlighting the back end of
13 that file path. What does this mean to you, the location of
14 the file? How can you read that from this folder path?

15 A. So the location of the file from My Book through all
16 those folders, Data/COMIC LO - Vol
17 40/Soul_of_Lolita_complex-Vol.1/ptm5/abemas2, folder A Day In
18 the Life, folder [Lcon] A Day In the Life - Chapter 4, folder
19 rtk, folder yup, folder lveogdstp, and then the file name of
20 Vicky String Bikini Pthc 11Yo Pedofilia.

21 Q. So the file name would be the last part after the last
22 forward slash; is that correct?

23 A. Yes, sir.

24 Q. Everything before that is really a folder that you're
25 clicking through to get to the file.

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1 A. Correct.

2 MR. CERVANTES: One moment.

3 (Pause.)

4 BY MR. CERVANTES:

5 Q. Okay. The last one we're going to do is row 11 from 5D.
6 We're going to see if this file is also listed in the list of
7 1,118 file names. I'm going to go to page 16, row 441.

8 Can you read the name of the file listed in row 441.

9 A. "Childlover - (Pthc) Sally - Medley Of Scenes (4yo to
10 8yo).mpg."

11 Q. Does Sally have any significance to you?

12 A. No, sir.

13 Q. Is that sometimes common to come across names, what
14 appear to be proper names and not know what it is?

15 A. Yes, sir.

16 Q. But there are some names that you do come across a lot?

17 A. Correct.

18 Q. Which is what we discussed before.

19 A. Yes, sir.

20 Q. Is this -- so is this file listed in the PLIST?

21 A. It is.

22 MR. CERVANTES: For the record, I'm just
23 highlighting the back end of that folder path.

24 Q. You previously mentioned that there were multiple
25 profiles in this MacBook.

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1 A. Yes, sir.

2 Q. Which profile is this PLIST associated with?

3 A. The profile that the PLIST is associated with is Morphus.

4 Q. I'm showing you what has been identified as Government's
5 Exhibit 5E.

6 Do you recognize this?

7 A. I do.

8 Q. What is it?

9 A. It's a screenshot from the Magnet AXIOM program reference
10 the details for the VLC PLIST.

11 MR. CERVANTES: Government moves 5E in evidence.

12 THE COURT: It's admitted.

13 (Government's Exhibit Number 5E was received into
14 evidence.)

15 Q. Can you describe to the jury what we're looking at here.

16 A. So at the top is the fields inside of the PLIST and on
17 the bottom is the details for the PLIST file itself.

18 Q. So if we were to expand this by clicking on this arrow on
19 the left, what would happen?

20 A. It would show you files from the recently played media
21 list.

22 Q. And we were looking -- previously looking at the
23 breakdown of the recently played list, correct?

24 A. Correct.

25 Q. So I want to draw your attention to the bottom of this

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1 document.

2 What does it tell you?

3 A. This tells me the location for the video -- or for the
4 VLC PLIST.

5 Q. Does this give you information about who the user was
6 that was logged in when the PLIST was created?

7 A. So the PLIST is created under the user Morphus, yes, sir.

8 MR. CERVANTES: No further questions, Your Honor.

9 THE COURT: You may cross examine.

10 CROSS EXAMINATION

11 BY MR. AMES:

12 Q. Good morning.

13 A. Good morning.

14 Q. So obviously you gave us a lot of information. I'll try
15 to do this in an organized fashion.

16 So again, with your background, you review a lot of these
17 types of cases, correct?

18 A. Yes, sir.

19 Q. You said you've gotten thousands -- or at least a
20 thousand devices or thousands?

21 A. Thousands of devices, hundreds of examinations.

22 Q. Can you briefly just kind of describe investigative wise
23 the process here. For example, when you're searching devices
24 for evidence and child pornography and working with law
25 enforcement agents, what's that process like? How does it

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1 begin?

2 A. So after the agent seizes a device, they'll put in a
3 request for us to conduct a forensic examination on the
4 devices.

5 Q. And have these devices been looked at before by anybody
6 or does it vary, or what's the...

7 A. The devices, to the best of my knowledge, have not been
8 looked at by anybody. We're the first ones to get them,
9 especially when it's an FBI case.

10 Q. So in this particular case with these ones you've
11 described today, when was the first time that you reviewed the
12 contents?

13 A. I'd have to review my logs when I reviewed it.

14 Q. That's fine. Do you have an estimate, ballpark?

15 A. Around 2021, like after September.

16 Q. So if you're doing an initial search, you mentioned --
17 you discussed flagging. What is that in regard to?

18 A. So flagging or either bookmarking, we'll use those terms
19 interchangeably about finding evidence of potential child
20 pornography that we will flag for further review.

21 Q. Okay. Does anyone else flag -- do any agents flag
22 anything or is that you doing it, or both?

23 A. So it's both.

24 Q. So there's some circumstances where an agent might have
25 flagged something. For example, I recall your testimony on

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1 one of the drives, the Western Digital, I believe, that you
2 noted one of the videos was flagged, correct?

3 A. I'm trying to remember on the Western Digital. I know on
4 the HP some of those were flagged and I reviewed them.

5 Q. Sorry, you're right. You're correct. It was the HP
6 Pavilion. So on the HP Pavilion, one of those images was
7 flagged, correct?

8 A. Correct.

9 Q. What was that in regard to? Was that an agent flagging
10 it or something else?

11 A. It was an agent that flagged it, yes, sir.

12 Q. Do you know who the agent was who flagged that?

13 A. I believe it was Special Agent Scott Atwood that flagged
14 it.

15 Q. Okay. So I guess in either case, either if you're
16 looking at it for the first time -- being the first person to
17 look at it or looking at it subsequently, your descriptions
18 here were categorizing some images as child pornography
19 specifically, correct?

20 A. Correct.

21 Q. So are you categorizing them in any other fashion? Like
22 what are some other categories that you might put into your
23 analysis?

24 A. We use potentially known victims, potential child
25 pornography, we use tags of S and M, tags of under 12 just to

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1 identify the child pornography itself or potential child
2 pornography.

3 Q. Some of the images, for example, we just went through on
4 the MacBook that had these morphed images, so to speak. When
5 you're marking something or categorizing something as child
6 pornography or potential child pornography, is that just
7 because it involves nudity or is there something more to your
8 portion of that analysis?

9 A. So mine is just when it involves nudity. If it is more
10 than just the breast area, we tag it. So when it shows
11 genitalia. Or if there is a lot of images, we'll tag them all
12 together so any of the agents can go back and further review
13 them.

14 Q. So in other words, do you know if you were the first one
15 to review the MacBook or was there an agent that reviewed that
16 one first, if you recall?

17 A. I don't recall.

18 Q. Hypothetically, if you were reviewing a device like that
19 first, your system of flagging images would be -- sounds like
20 you're casting a wide net, right?

21 MR. CERVANTES: Objection, relevance.

22 THE COURT: Overruled. You may answer.

23 THE WITNESS: So can you be more -- like casting a
24 wide net?

25 Q. Sure. You're saying basically if it's any nudity

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1 involving a potential minor more than just breast area, I
2 suppose, you're flagging those as child pornography or
3 potential child pornography, correct?

4 A. Yes, sir, potential child pornography.

5 Q. Just in general, are you doing an analysis -- it doesn't
6 sound like it, but correct me if I'm wrong. It doesn't sound
7 like you're doing an analysis of the actual photo if it is
8 child pornography. It's just that it needs to be reviewed
9 further.

10 A. Yeah. I mean, being that I review a lot of images, you
11 see a lot of them that are the same whether they are known
12 victims or unknown victims. So when I do flag them, I am
13 flagging them as potential child pornography for the case
14 agents to review.

15 Q. So like on the MacBook, for example, those three folders
16 you were testifying about, there's a number of images that
17 depict nudity, correct?

18 A. Correct.

19 Q. In circumstances like that, did you flag all images in
20 those folders that involved nudity or was there any
21 delineation between anything you would choose?

22 A. I believe in that case any of the images that contained
23 nudity were flagged.

24 Q. Okay. And the flag that you use is child pornography or
25 potential or...

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1 A. Correct, yes, sir.

2 Q. Okay. But that -- so when you're stating that you -- I'm
3 flagging it as pornography or child pornography, is that your
4 determination that in fact it is child pornography or just
5 needs to be reviewed further?

6 A. So it is not mine. I review it to be potential child
7 pornography. I know we use the term flagged as child
8 pornography. Some of them you can tell whether it's an infant
9 or a young girl. But, no, I don't make that determination. I
10 flag them for review.

11 Q. Understood. So, you know, we just went through a series
12 of these morphed images. Clearly some of those images
13 involved just the waist up, correct?

14 A. Correct.

15 Q. Or breast area. No genitals involved in the picture.

16 A. Correct.

17 Q. Others included people standing and not really doing --
18 standing up and not really doing anything otherwise.

19 A. I'd have to review them, but I know there were some that
20 were waist up, correct.

21 Q. Were any of these involving intercourse or of a minor
22 depicted on that MacBook?

23 MR. CERVANTES: Objection, vague.

24 THE COURT: Overruled. If you understand the
25 question, you can answer it. If you need clarification, ask

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1 for that.

2 THE WITNESS: So did I see any images involving
3 intercourse of a minor?

4 Q. No, on the -- specifically those three folders on the
5 MacBook. These are the morphed images that we're talking
6 about.

7 A. Okay.

8 Q. All I'm just trying to ask is these weren't -- there's
9 no -- the images that we're talking about that you're flagging
10 on that particular device, they're not images involving
11 bestiality or intercourse or anything like that, correct?

12 MR. CERVANTES: Your Honor, objection to the extent
13 that it calls for a legal conclusion.

14 THE COURT: Overruled.

15 THE WITNESS: I did not see any images of
16 intercourse or bestiality in those photos.

17 Q. Or anything -- oral sex or anal sex or anything like that
18 either, right?

19 A. No, sir.

20 Q. So the images are -- the images -- some of them are
21 standing. Some of them are lying. Some of them are sitting
22 in various positions. And if it has nudity you're flagging it
23 for further review, correct?

24 A. Correct.

25 Q. Without a determination on your end because, again,

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1 you're just assisting with gathering those images for further
2 review, right?

3 A. I am. But I will also categorize them. There was one
4 image in there that I did categorize as child pornography.

5 Q. Okay. Sorry, there's one?

6 A. There was one in there.

7 Q. That you --

8 A. That I remember, excuse me.

9 Q. Okay. There's one that you remember that you categorized
10 as child pornography.

11 A. Correct.

12 Q. What did you categorize the other ones as?

13 A. Potential child pornography for the case agents to
14 review.

15 Q. Okay. So the distinction, then, there's these
16 categories. And from your analysis -- and, again, regardless
17 of whether it was first or second or third or however
18 multiple -- presumably multiple times you might review devices
19 in some cases, right?

20 A. Correct.

21 Q. The tags or the flags on that particular thing was there
22 was one that you flagged as child pornography, other ones were
23 not flagged as child pornography.

24 A. They were flagged as potential child pornography, yes,
25 sir.

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1 Q. Potential. Okay.

2 Now, I'm not a Mac user so this is a little unfamiliar,
3 this quick thumbnail process.

4 A. Uh-huh.

5 Q. So a lot of the stuff we're talking about, really all --
6 I think practically all of it on this MacBook, the data you're
7 talking about is related to this QuickLook thumbnail cache
8 folder --

9 A. Database.

10 Q. -- database, right?

11 If you could remind me of the process of how that's
12 created. It's a creation of a thumbnail for a specific Mac
13 operating system.

14 A. So we can associate it with Windows too if that will help
15 you.

16 But what QuickLook is is once you plug in your hard
17 drive, it will go in there and create previews or thumbnails
18 of the files inside of the thumb drive or external.

19 We can reference it to a Windows machine if you are
20 familiar more with Windows to where when you plug in a thumb
21 drive, when you bring up the window of the files in there, you
22 can select how you view those thumb drives, whether it's in a
23 detailed list or with small thumbnails, medium thumbnails or
24 extra large thumbnails. That creates this thumbnail database.

25 Q. Yeah, actually that does make sense now.

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1 So the creation of these thumbnails from the -- so you
2 plug in the device, you open a folder. Is it automatically
3 populating thumbnails for everything on a device or is it that
4 a folder has to be open for it to happen?

5 A. So with QuickLook it actually creates them just by
6 plugging in a device.

7 Q. And saves this ostensibly to the device you're plugging
8 it into.

9 A. It saves the thumbnail cache to the device that you're
10 going to view or plug in the thumb -- like the thumb drive
11 into the computer. It saves it to the computer.

12 Q. Okay. So automatically will populate these images that
13 are in a cache system so that they can be more quickly
14 accessed later if you're scrolling through a folder.

15 A. Correct. If you plug it in again, it will access those
16 thumbnails so it doesn't have to recreate it. The reason they
17 do is because they end up clogging people's machines or
18 overloading the source. So this way they only have to create
19 it once and they can reference the same image or thumbnail.

20 Q. And so the images, for example, that we were talking
21 about on the MacBook specifically in those folders and things
22 you referenced, those aren't original actual images on the
23 device, but rather a creation of a thumbnail from a secondary
24 device; is that accurate?

25 A. The originals referenced are not on the MacBook. It is a

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1 creation from the originals of the drive plugged in.

2 Q. Okay. And it's located in this QuickLook folder cache
3 thing, right?

4 A. Thumbnail database, yes, sir.

5 Q. Sorry, thumbnail database.

6 And that's a random kind of folder, right? You said
7 something about it goes and it's under like kind of random
8 letters.

9 A. Yes, sir.

10 Q. These thumbnail images that are in there, are those
11 accessible just by -- can you open and browse through those
12 folders and pop the images up?

13 A. I mean, if you had a program you could; but without a
14 certain program, no.

15 Q. What kind of program is that?

16 A. Just like you would have to find -- literally it would be
17 a QuickLook thumbnail viewer or any other program that would
18 access those.

19 Q. Okay. Like a specialized type of software to access them
20 if you wanted to browse through or preview those things.

21 A. Correct.

22 Q. The Magnet program that you use, that's called Magnet
23 AXIOM, correct?

24 A. AXIOM, yes, sir.

25 Q. Or AXIOM Magnet. Just AXIOM?

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1 A. AXIOM is fine.

2 Q. Obviously, if you were presenting them now, you were able
3 to access those thumbnail images?

4 A. Correct.

5 Q. Is that because your program has that special feature
6 that you can go in and see what the actual image is?

7 A. Correct. It will go into the database and pull the
8 thumbnails out.

9 Q. Okay. Now, there was also a list of file paths that
10 had -- a thousand and some odd file paths were introduced.
11 Where are any images of those?

12 A. So there are no images in that QuickLook. It just
13 retained the file path associated with them.

14 Q. Okay. So there are no images. There's no date of when
15 this image was -- or this -- actually, it's not even an image.
16 It's a -- it's just a trace of some sort of thumbnail
17 allegedly. Is that --

18 A. No. What it is is the file path for a thumbnail that was
19 created, but the thumbnail in that database is no longer
20 there.

21 Q. Okay.

22 A. But the file path is still there.

23 Q. All right. So it's literally just a file path and that's
24 it.

25 A. Correct.

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1 Q. There's no date.

2 A. No, sir.

3 Q. There's no image.

4 A. No, sir.

5 Q. There's no time frame of when it was created.

6 A. Not that I could tell.

7 Q. You mentioned -- discussing some of this, you talked
8 about last accessed dates, right? So there's some metadata
9 that you talked about that said we can tell when this was last
10 accessed.

11 A. Correct.

12 Q. What does last accessed mean?

13 A. So last accessed in a QuickLook means that when the
14 QuickLook thumbnail database last accessed those thumbnails.

15 Q. Understood. So when we say accessed or to access, last
16 accessed, what you're referring to is when the computer
17 accessed the cache folder.

18 A. So for the computer to access that cache folder, the
19 thumb drive or an external, we'll call it a thumb drive, would
20 have to be plugged in and then it would recognize the folder
21 path or however it recognizes it, and then would access the
22 thumbnail database -- yeah, the thumbnail database for that
23 thumbnail. So if you were going to pull up that folder, it
24 would already have the thumbnails ready.

25 Q. Understood. And that's, again, to speed up the process,

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1 more convenient, so that in the event the user wants to open
2 that folder, the thumbnails will populate faster?

3 A. Correct.

4 Q. So it does this automatically for you as part of the user
5 experience if you decide to click on a specific folder,
6 correct?

7 A. Correct.

8 Q. So it does not mean that you have to open the folder or
9 access anything within the folder, correct?

10 A. To the best of my knowledge, that is correct.

11 Q. So in other words, what the -- the last accessed date,
12 for example, you talked about -- and it's in evidence as
13 well -- IMG_3666.MOV, 3696, and then IMG_1089, some of those
14 you discussed had a last accessed date of 9/10/21; is that
15 correct?

16 A. I believe so. Without seeing it I believe so.

17 Q. Do you recall the access time for each of those images?

18 A. No, sir, I do not.

19 MR. AMES: Is that something you can pull up real
20 quick?

21 MR. CERVANTES: Whatever you need.

22 MR. AMES: Just looking at the metadata on the 3666,
23 3696. It was the screenshots of the metadata on these three
24 images.

25 I apologize, I should have written down those

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1 exhibits and I forgot to.

2 THE COURT: Why don't we take our midmorning break
3 and let the lawyers get together on pulling up whatever
4 exhibits are needed for cross examination.

5 MR. AMES: Thank you, Your Honor.

6 THE COURT: I expect you can tell me the rules, but
7 I'm going to tell you anyway.

8 Do not discuss this case when you're in the jury
9 room. Don't start making up your mind. And obviously, don't
10 do any independent research. And we'll be back within 15
11 minutes or so.

12 (Jury exited the courtroom.)

13 THE COURT: You can step down.

14 (Witness stepped down.)

15 THE COURT: All right. We'll be in recess for 15
16 minutes.

17 (Brief recess at 10:22 AM.)

18 (Court back in session at 10:39 AM.)

19 THE COURT: Are we squared away?

20 MR. AMES: Yes, Your Honor.

21 THE COURT: You can bring the jury.

22 (Jury entered the courtroom.)

23 THE COURT: All right. You may resume.

24 JASON WHITT

25 CROSS EXAMINATION (Cont'd.)

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1 BY MR. AMES:

2 Q. All right. So I think where we were, we were talking
3 about the last accessed date from metadata, right?

4 So previously you had testified about a series of three
5 images that had been last accessed on September 10 of 2021.
6 Do you recall that?

7 A. Was it the images or the videos?

8 Q. I'm sorry, it was three videos where the last accessed
9 date listed on these quick view thumbnails was 9/10 of 2021.

10 A. Correct.

11 Q. And I think I had asked you what time those last
12 accessed -- or what time the last accessed data had shown for
13 those, and I wanted to just review those to refresh your
14 memory on it if you couldn't recall.

15 A. Okay.

16 MR. AMES: 5H, I, and J, just the metadata
17 screenshot.

18 MR. CERVANTES: There is no 5HI. 5H?

19 MR. AMES: Yes, that's it.

20 Q. Okay. So do you recall this? This is one of the
21 government's exhibits. Do you recall this one?

22 A. I do.

23 Q. What is this one?

24 A. It is a screenshot for the thumbnail created of the file
25 name IMG_1089.

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1 Q. What this data shows is the thumbnail last accessed date
2 and time --

3 A. Correct.

4 Q. -- is September 10, 2021, at 5:28 AM.

5 A. Correct.

6 Q. Correct?

7 So that shows last accessed date.

8 MR. AMES: And then there was a couple more, just
9 the next two.

10 MR. CERVANTES: Which one?

11 MR. AMES: The next one, 5...

12 MR. CERVANTES: I need a number.

13 MR. AMES: It's listed as 5I.

14 THE COURT: It's not been admitted. 5I has not been
15 admitted.

16 MR. AMES: 5J then.

17 THE COURT: J has not been admitted.

18 MR. AMES: 5K.

19 THE COURT: That one has.

20 MR. AMES: Okay. 5K. Sorry, Your Honor.

21 Q. Okay. So this one over on the right, 5K, this is also a
22 screenshot of some metadata from AXIOM, correct?

23 A. Correct.

24 Q. And this is of a different file, 3666, right?

25 A. Correct.

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1 Q. And this has an accessed date -- or last accessed date of
2 9/10/2021, correct?

3 A. Correct.

4 Q. That's also at 5:28 AM and 29 seconds.

5 A. Correct.

6 Q. So both of these were last accessed on the same day at
7 the exact same time, correct?

8 A. So the folder that they were in or the thumb drive that
9 they were contained on -- the Passport, excuse me, the
10 external drive, was last accessed -- appears to be last
11 accessed at the same time.

12 Q. Okay. So I imagine, then, that with the way this
13 thumbnail procedure works, that when the device is plugged in
14 to the MacBook and it's populating these, as you stated
15 before, the last access means the computer accessing the
16 external device.

17 A. To the best of my research, that is what it means.

18 Q. And it's automatically kind of populating this stuff. So
19 likely, then, it would follow that other images that have
20 these thumbnails, like these videos and others or any other
21 images or, you know, whatever the file is that might have a
22 thumbnail, all of these would have a last accessed 9/10/21,
23 5:28, or thereabouts, right?

24 A. Should.

25 Q. It would not require opening or viewing the file,

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1 correct?

2 A. To the best of my knowledge.

3 Q. And nor does it even require opening the folder that the
4 file is in.

5 A. To the best of my knowledge and research.

6 Q. So what it perhaps tells us is that one device was
7 plugged into another.

8 A. That the My Passport was plugged into the MacBook.

9 Q. Okay. At 9/10/21 at 5:28 AM it was plugged in and that's
10 what we can glean from this.

11 A. Potentially.

12 Q. Potentially?

13 A. So when you look at times, these times, I don't know if
14 they were recorded in UTC time or if they were recorded in
15 Eastern Standard Time.

16 Q. Fair point. Can you describe what UTC time is and what
17 that relates to as far as EST?

18 A. Sure. So UTC time is where time is, like, zero. Like,
19 think of it -- they call it Zulu, or GMT I believe another
20 term for it is. So it's literally in the middle of the world.
21 And as you go back -- so think of it as a timeline. As you
22 move forward towards Europe, it counts up, one, two, three,
23 four, as far as time zones go. As you count back towards
24 North America, it counts as negative one, negative two,
25 negative three, and so on. So Eastern Standard Time,

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1 depending on whether we're in Daylight Savings Time, will be
2 negative four or negative five from UTC time.

3 Q. So the benefit of UTC time is kind of -- it's uniformity
4 and organization to some extent as far as forensic analysis.

5 A. So UTC time is recorded, yeah, for uniform and then --
6 because you want the right programs to be in a specific time
7 zone.

8 Q. So in AXIOM, for example, there are certain instances
9 where you might see it specifically delineated this is UTC
10 versus EST or other time zones?

11 A. Sometimes you can see where it is, yes, sir.

12 Q. Is it ambiguous in other times or is it traditionally
13 something specific?

14 A. It can be either/or.

15 Q. Okay. Do you know whether or not this is -- this 5:28 AM
16 is UTC versus Eastern?

17 A. I do not.

18 Q. Okay. So it could be 5:28 AM or it could be UTC time
19 which means it could be four or five hours later.

20 A. Depending, yes, sir.

21 Q. Okay.

22 A. It could actually -- if this was UTC time, it would be
23 5:28. If it was Eastern Standard Time, it would be 1:00 in
24 the morning or midnight.

25 Q. Okay. So the UTC -- for the eastern time zone we're

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1 going earlier --

2 A. We're going back.

3 Q. -- four or five hours depending on Daylight Savings as
4 well?

5 A. Correct.

6 Q. So hypothetically, 5:30 in the morning, roughly, or
7 12:30, 1:30, give or take, would be presumed if we believed
8 that that's the accurate time a device was accessed.

9 A. Say that again, I'm sorry.

10 Q. That was a big mouthful, sorry.

11 If we assume that this is correct, that the device was
12 accessed, it's either eastern time, thereabouts, at 5:30 AM.
13 Or if this is UTC, it means that the device was actually
14 accessed in our time zone at 1:30 AM or perhaps 12:30 AM
15 depending on Daylight Savings. I don't know at that time of
16 year what it would be.

17 A. Correct.

18 Q. Does UTC take into account anything for Daylight Savings
19 or that would be on the conversion end depending on the time
20 zone you're in?

21 A. The time zone.

22 Q. Okay. So these QuickLook things, it will populate on a
23 variety of devices. We're talking here about, like, an
24 external hard drive or a thumbnail. Are there some other
25 devices that it will populate these type of thumbnails for?

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1 A. A device that you plug into the MacBook.

2 Q. Is it any device that has -- or what kind of files or
3 thumbnails are created? Is it more than just images or MOVs?

4 A. It can be for documents, PDFs, those types of things.

5 Q. Any other image types it could do or video types it could
6 possibly do?

7 A. Sure. I mean, any file that you can get a thumbnail
8 from.

9 Q. Now, there are multiple devices that have been discussed
10 here. It includes these thumb drives -- rather, thumb drive,
11 another hard drive, and so on. Isn't it also the case that
12 encrypted or password protected drives also populate these
13 quick view thumbnails on the device when you plug it in?

14 A. I don't know the answer to that. I would believe that
15 you would have to decrypt it for it to access it, but I'm not
16 sure 100 percent.

17 Q. Are you aware that Apple has had some significant issues
18 with privacy concerns based upon plugging in of devices that
19 are encrypted and it saving thumbnails in that data?

20 A. No.

21 Q. Okay. And that -- I mean, are -- so you don't know for
22 sure whether or not a password protected or encrypted device
23 automatically will populate these things or what might trigger
24 it to populate these things.

25 A. No.

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1 Q. Okay. I guess regardless of that, plugging in is the
2 trigger point to populate them, correct?

3 A. To the best of my knowledge, yes, sir.

4 Q. So if I were to go to someone's computer with a thumb
5 drive and pop it in and open it up, whatever I've got on that
6 drive is going to create thumbnails. It's going to create a
7 file path on my -- on the laptop, the computer I'm connecting
8 it to, correct?

9 A. If you have access to the user, sure. If you plug in
10 something, it would populate.

11 Q. Okay. And then, you know, you pop it out and it's there
12 and it remains there and presumably undetectable to a normal
13 user, correct?

14 A. Correct.

15 Q. Because you can't even look at them unless you have
16 specialized software.

17 A. To the best of my knowledge, yes, sir.

18 Q. So you'd never be the wiser. Now, if one day somebody
19 comes in the sights of the federal government and you are
20 tasked with reviewing that device and you see in the cache
21 here a bunch of thumbnails, you're going to flag them and you
22 guys are going to do this process that you've done here,
23 correct?

24 A. Correct.

25 Q. In addition, it sounds like it includes potentially even

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1 things that are no longer -- there are no thumbnails for or
2 other indicia of anything, just a file path, just the words,
3 correct?

4 A. According to the pthc?

5 Q. I'm just saying, yeah, that's an example. But that -- to
6 be clear, those are in -- those are located in this cache
7 database?

8 A. Correct.

9 Q. But there's no thumbnail associated with any of them,
10 correct?

11 A. No, sir, there's not.

12 Q. There's no last accessed date associated with any of
13 them, correct?

14 A. No, sir.

15 Q. There's no creation date, nothing. It's literally just a
16 string of words. That's all that's there.

17 A. To the best of my knowledge, in the database it is the
18 folder and path and the title of the file itself.

19 Q. So all of those one thousand some odd images that you --
20 or one thousand some odd file paths, rather, that you
21 referenced and the government produced here, that's the extent
22 of their existence on the devices. There's no other indicia
23 of it. There's no thumbnail for any of that stuff, correct?

24 A. Correct. It's just the folder path and the file name.

25 Q. Okay. So you referenced there's multiple users on this

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1 MacBook laptop, correct?

2 A. Correct.

3 Q. You named a couple of them. One was the David Tatum
4 profile. There was another, Morphus, I believe.

5 A. Yes

6 Q. Are there any others?

7 A. There are three others. There's a guest account, a Kim
8 Tatum account, and I can't remember the last one.

9 Q. Is guest kind of a default thing or does that have to be
10 made or...

11 A. To the best of my knowledge, guest is the default one.

12 Q. But there's an account for a Kim Tatum?

13 A. There's an account for a Kim Tatum.

14 Q. Who is Kim Tatum?

15 A. I believe the wife of Mr. Tatum, David Tatum.

16 Q. Have you ever met with her or spoken with her before?

17 A. No, sir.

18 Q. Okay. Are you familiar with her at all just based upon
19 your review of these devices?

20 A. Just from the review of the devices.

21 Q. Are you familiar with her at all because of anything
22 involving the investigation?

23 A. I mean, not outside the investigation. You did hear talk
24 of, you know, who was --

25 MR. CERVANTES: Objection, hearsay.

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1 THE COURT: Sustained.

2 MR. AMES: It's not for the truth of what they're
3 saying.

4 THE COURT: Ask another question.

5 MR. AMES: Understood, Your Honor.

6 Q. So she has a login on the MacBook. Does she have a login
7 or user input or name on any other devices that you've
8 reviewed in this case?

9 A. Not that I can recall.

10 Q. Does she -- have there been any files that you have
11 reviewed on devices that belong to her?

12 A. There have been files that belong -- that I have seen
13 that belong to Mr. David Tatum and Kimberly Tatum. But I
14 don't remember any of the files that belong just to her.

15 Q. Okay. On the MacBook -- so, for example, you provided
16 some things like a Jet Blue airline receipt and letter from
17 Wake Forest that, I suppose, are indicative of David Tatum
18 being a user of this device. Is that the purpose,
19 essentially?

20 A. Attribution, yes, sir.

21 Q. Attribution. Do you check for attribution of anybody
22 else in that process or are you mainly just looking for him?

23 A. So I do not remember any attribution relating to
24 Kimberly, a Kimberly Tatum.

25 Q. Did you look for any, though?

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1 A. When we were looking for it, the ones that popped out
2 were the resumes, the CVs, the boarding passes. I do not
3 remember any other files with Kimberly Tatum.

4 Q. I guess what I'm asking is that in -- what was the
5 purpose of doing that, looking for a file like that or files
6 like that to -- is it to establish use or ownership? Or
7 what's the purpose?

8 A. It is.

9 Q. For both or...

10 A. The files that we found for attribution were Mr. Tatum's.
11 There were also, you know, files of tax returns, joint tax
12 returns for a Kimberly Tatum and a David Tatum.

13 Q. Okay.

14 A. I did not find any files that I can recall that reference
15 a Kimberly Tatum.

16 Q. I guess what I'm asking, were those looked for or was
17 your job to find an attribution for David specifically?

18 A. We would have looked for them. I mean, any attribution
19 we would have brought up. To the best of my recollection, I
20 do not remember any attribution outside of those tax returns.

21 Q. I mean, what would be some -- you've provided some
22 already, but what are some other examples of what would be
23 considered an attribution? Like receipts or what else?

24 A. Just receipts, documents, web pages, personal photos.

25 Q. So let's say that you're going through, for example, this

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1 MacBook and you are looking for attribution and you find some
2 stuff like you produced here that involved David Tatum. And
3 you also find some that involve other people, such as his
4 wife. You're saying that that would be -- what do you do at
5 that point with that information?

6 A. So when we take the MacBook, we saw that all the files
7 that we flagged were to a user name of David Tatum. So we
8 look for attribution of a David Tatum -- or for who was using
9 that and it came back to David Tatum. Since none of the
10 evidence led me to Kimberly Tatum's user profile, I did not
11 look for any, like, attribution for her or in that -- in her
12 profile because nothing led me there.

13 Q. Understood. And I understand, like, the purpose of what
14 you're looking for is not -- what I'm saying is, you're tying
15 the device to David due to his attribution, but there could be
16 other people that use the device, correct?

17 A. So we tied it to Mr. Tatum or David Tatum through the
18 user name of David Tatum. And we look for attribution of the
19 user name of David Tatum.

20 Q. And one of those attributions was a joint tax return,
21 correct?

22 A. I believe there was a joint tax return. I do not
23 remember if it was on the external or the MacBook.

24 Q. Do you know if David Tatum's login is password protected?

25 A. There is a password. I don't know exactly what it is.

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1 There is a field for the password in the user information that
2 it hashes the password. That's just how Mac records the
3 password. But I do not know what that password would be.

4 Q. Do you know that -- is that -- do you have to log in each
5 time you use the device or would it be something that once
6 it's logged in, it just kind of pops up when you open it?

7 A. It all depends on the factors of the user settings how
8 that would work.

9 Q. And would it be uncommon for a married couple to share a
10 login on the same computer?

11 MR. CERVANTES: Objection, speculation.

12 THE COURT: Overruled.

13 MR. AMES: I'm asking --

14 THE COURT: Go ahead.

15 THE WITNESS: I wouldn't know. I mean, I think
16 everybody is different so I would not know the answer to that.

17 Q. What about this device, do you know whether or not this
18 was a device that Kimberly and David shared?

19 A. Outside of the user name, I do not know.

20 Q. Okay. Did you review any files or images at all that
21 indicated that Kimberly Tatum was -- had access to this
22 device?

23 A. Outside of the user name, I would not know.

24 Q. On any other evidence that the government collected, did
25 you see anything else that might have indicated that she uses

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1 this device?

2 MR. CERVANTES: Objection, vague.

3 THE COURT: Overruled. If you understand the
4 question, you may answer.

5 THE WITNESS: Can you repeat it, please.

6 Q. Sure. I can rephrase it if it's easier to hear it.

7 You reviewed these devices, correct?

8 A. Correct.

9 Q. Did you review any other devices?

10 A. I did.

11 Q. What else did you review?

12 A. There was a lot of visual evidence we reviewed.

13 Q. How many total devices were collected in this case?

14 A. I don't know.

15 Q. Is it more than ten?

16 A. I don't know.

17 Q. Of what you recall, what are some of the devices you
18 recall either that you know were collected or that you
19 specifically reviewed?

20 A. There was an iMac, the devices here. I mean, a few.

21 Q. Okay. Do you recall any that there was an attribution to
22 Kimberly Tatum at all?

23 A. I do not. Outside of the user name on the MacBook
24 because that's where the evidence led us. Outside the user
25 name I do not know of any.

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1 Q. So how would it -- what would it entail if you were
2 trying to look for that -- what are the steps you would take
3 to find an attribution like that or find indications that she
4 was a user of this device?

5 A. So again, when we look for the evidence, we go to the
6 evidence where it leads us. In this instance it led us to the
7 user of David Tatum. When we go and look for attribution, we
8 look for the documents or history, whatever it might be, that
9 leads to the attribution of that account, user account. And
10 all that I found outside -- to the best of my recollection,
11 all that I found was a joint tax return that had Kimberly's
12 name on it and also there was a user name on the MacBook for a
13 Kim Tatum.

14 Q. Okay. Did you look into when the last time Kimberly
15 Tatum had logged into the MacBook?

16 A. I did not.

17 Q. Would that be -- what would it take to find that
18 information in AXIOM?

19 A. I would have to go back to my lab and look at it.

20 Q. Okay. Were there any devices that -- I understand the
21 process when you're interacting with agents and such and
22 assisting them either as the first looker or looking after
23 they've flagged things. Do you know if there's any devices in
24 this case that any agent or other person in the investigation
25 has looked at that you have not?

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1 A. I do not know.

2 MR. CERVANTES: Objection, speculation and vague.

3 THE COURT: Overruled, if you know.

4 THE WITNESS: I do not know.

5 Q. Outside of the thumb drives that you presented, are there
6 any additional thumb drives that were collected or seized by
7 the government?

8 A. I do not know.

9 Q. You don't know if there's any other thumb drives?

10 A. Honestly, once we found this evidence, I focused on these
11 pieces of evidence and I cannot remember exactly what I
12 examined when it comes to the extra devices.

13 Q. I'm sorry, I didn't actually -- if I misspoke, I
14 apologize. I wasn't asking if you specifically even
15 necessarily reviewed them. I'm just asking were there other,
16 for example, thumb drives that were collected in this case?

17 A. I cannot remember.

18 Q. Okay. Do you remember any other device that was
19 collected in this case?

20 A. All I remember is an iMac.

21 Q. Did you ever make copies of any of the device data for
22 me?

23 A. So I do remember there was the thumb drives from a
24 Kimberly Tatum that copies were made for you.

25 Q. Okay. Were there any other ones?

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1 A. There was another one that came from somewhere.

2 Q. Okay. And did you ever -- did you review those devices
3 or did you not review those devices?

4 A. So outside of just making an image of them to, you know,
5 keep them pure, I mounted them for the agents and they would
6 go through them. I have seen files on them. But as far as,
7 like, reviewing them forensically, I did not.

8 Q. Understood. If you recall from -- I understand you
9 didn't review it thoroughly, you didn't review it in the
10 capacity you would other devices, but do you recall anything
11 that you observed on either of those?

12 A. So I do remember some of the folder names, but I do not
13 recall every single thing on there. Because again, I did not
14 forensically process that.

15 Q. What are some examples of things that you may remember?

16 A. There was some screenshots of a desktop, there was
17 folders with David's name on it, some emails. That's
18 basically all I recall.

19 Q. Do you recall seeing any -- you said pictures of a
20 desktop computer, I think you said.

21 A. So I saw pictures of a screenshot of a computer on there.

22 Q. Do you recall seeing any screenshots or pictures of
23 screenshots or anything of -- of the MacBook that's in
24 evidence?

25 A. So I don't know exactly what the screenshots were of. I

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1 do believe it was of the MacBook, but I do not recall.

2 Q. And I understand you didn't -- you weren't doing the
3 analysis to attribute this device to anybody. But your
4 understanding was that this was a device provided by Kimberly
5 Tatum, correct?

6 A. Correct.

7 Q. And it included pictures of a MacBook computer screen
8 that you believe is this one that's sitting next to you.

9 A. I believe so.

10 Q. So you also in your testimony talked about how you do
11 these keywords -- index searches, I think you said, right?

12 A. Correct.

13 Q. And you indicated that the user profile doesn't impact
14 that search, right?

15 A. Not of the index search.

16 Q. So you could do an index search that would encompass any
17 and all profiles on a system.

18 A. Any file that the computer can access or the software can
19 access, it will look for it in any place.

20 Q. And then once you find things that you may want to look
21 into further, you can determine and delineate which user
22 profile that may be associated with, right?

23 A. Yes, sir.

24 Q. So that may tell you where -- or to whom the computer was
25 logged into at the moment when some data was populated, but

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1 does it tell you anything about who was actually using the
2 device?

3 A. No, sir. We don't look at who actually uses the device.
4 We look at the user name associated with the evidence.

5 Q. And I suppose you can never be certain unless you had a
6 spy camera or something, but are there -- would there be ways
7 to maybe determine that based on the context of the data?

8 A. As to what? Like the context of...

9 Q. So let's say, for example, you mentioned 6/29 of 2021
10 there was a VLC playlist. Do you recall that part?

11 A. Correct. I don't think I mentioned the 6/29, but I do
12 know that date of 6/29.

13 Q. It may have been on a screenshot here, but I believe -- I
14 believe the testimony was it was 6/29 was when this PLIST was
15 created and it was under the account Morphus. Do you recall
16 that?

17 A. So we discussed when it was first played. But the PLIST
18 creation date does say 6/29.

19 Q. Okay. And there was an initial date. So it was, like, I
20 can't remember exactly, but sometime in 2019. And then the
21 PLIST creation date was June 29, 2021, correct?

22 A. I think it was June 21. I don't remember the exact date,
23 but...

24 Q. So that's the date of creation and so that's similar, I
25 guess, to the quick view situation. It's a list that's

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1 generated because a user does something with the VLC player.

2 A. Correct. I mean, without having to program the VLC
3 program, that's what I believe the recent play media to be and
4 the VLC PLIST.

5 Q. So at that point in time -- so, for example, you'd
6 indicated that the user profile that was associated with this
7 was Morphus, I believe?

8 A. Correct.

9 Q. So that's an example. Well, the context around that is
10 there's a -- that's one piece of context since there's a user
11 name or account Morphus that's on this device at the time,
12 correct?

13 A. Correct.

14 Q. And there could be other activity with that account or a
15 specific person that's around the same time frame that might
16 provide context also.

17 A. So the evidence led us to Morphus. We just saw the VLC
18 playlist and we -- that's what we focused on as far as being
19 played on the VLC program.

20 Q. Understood. And so in light of that, you know, you
21 see -- you see that it's what it is. You see what account or
22 login it's under, and that is sufficient to draw the
23 conclusion that the user was David.

24 A. No, the user was Morphus.

25 Q. Okay. And Morphus is who?

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1 A. With the associated names of Morphus to David's iPhone,
2 that's where it led us to believe that it was David's account.

3 Q. Okay. Or in other instances where you're doing an index
4 search and it comes back and it's under the David Tatum
5 account, the presumption is that it's David Tatum, correct?

6 A. The user of David Tatum.

7 Q. I'm sorry?

8 A. The user of the account David Tatum.

9 Q. Okay. And -- but then how do you link the user account
10 to a human being? Is that through that, you know, the Jet
11 Blue record and things -- tax records and such?

12 A. We put in attribution, yes, sir.

13 Q. So I guess what I'm asking is, is anything else done to
14 determine -- any other context who might be using the device
15 for that period of time other than what you already testified
16 to?

17 A. No. We just focused on the user accounts on the MacBook.

18 Q. All right. So if somebody else that was not David Tatum
19 put anything into this device and it populated a list like it
20 does here automatically --

21 MR. CERVANTES: Objection, vague.

22 MR. AMES: I haven't finished the question.

23 THE COURT: Let's wait for that.

24 Q. If anybody -- say I did it. Just use me for now. I go
25 to David's house, his computer is on or I know the password or

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1 I don't require a password because we don't even know if his
2 computer needs one. Let's say that's the case. And I've got
3 a drive or one of his drives, I don't know, one I find, and I
4 pop it into the device. It's going to populate a number of
5 things, including a QuickLook thumbnail update and pop the
6 date and time right now in, correct?

7 A. Correct.

8 Q. So that if you analyze it the next day, what is it going
9 to look like?

10 A. So it would look like what we see.

11 Q. Okay.

12 A. But in forensics we only look at the user accounts. We
13 do not look at who was using the user account. We go into
14 attributions and see who the user account had access to
15 through passwords and other files that are on there.

16 Q. But you don't look for other possible user explanations,
17 is basically what you're saying. So you wouldn't be looking
18 for me or context that might indicate that I did this and put
19 something in.

20 A. Forensically, no.

21 Q. Okay.

22 A. We just focus on the user accounts forensically.

23 Q. Now, forensically could it be done? Could there be
24 evidence that is gathered in the data that you guys have that
25 could provide some context to who the user was?

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1 A. Like you were talking about earlier, without a spy cam
2 watching you do it, I'm not aware of any.

3 Q. But you do it with attribution all the time. We did it
4 with a 2010 Jet Blue printout of a ticket. We also did it,
5 apparently, literally with a joint tax return which has two
6 people on it, not one. So why is it not just as likely that
7 Kim Tatum can be attributed to that document?

8 A. I found no evidence of Kim Tatum attribution on those
9 accounts outside of the tax returns.

10 Q. But you didn't look for it either. I understand your
11 position. You're not -- that's not your purpose. You're
12 given an instruction to look for things, correct?

13 MR. CERVANTES: Objection, argumentative.

14 THE COURT: Overruled.

15 THE WITNESS: So repeat it one more time, I'm sorry.

16 Q. So you're -- again, I understand an investigation evolves
17 in various ways. Sometimes you're first; sometimes someone
18 else is first. But you're looking for evidence of
19 attribution. Are you looking for attribution of David or are
20 you looking just in general, whoever it may be, I'll come to
21 that conclusion after I sift through the data?

22 A. Forensically we look for who has files on there. If
23 there's files on there associated with somebody other than
24 David Tatum, we would have mentioned that. We do know there
25 was a tax return, joint tax return. For the files that I

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1 found on the MacBook, that came back to David Tatum. And I
2 did not see any files that came back to Kimberly Tatum.

3 Q. Okay. But again, I want to clarify. I don't want to --
4 in large part that's because you weren't specifically looking
5 for attribution of anyone else.

6 MR. CERVANTES: Asked and answered.

7 THE COURT: Sustained. You've established it.

8 Q. So we don't know if somebody else, Kimberly Tatum or
9 otherwise, is a person on any of these dates that may have
10 popped a device into that MacBook.

11 A. Forensically we only look at the user accounts.

12 Q. Okay. In other words, we don't know. We don't know who
13 the actual human being is that would have put anything into
14 the --

15 MR. CERVANTES: Objection. Asked and answered.

16 THE COURT: Sustained.

17 Q. So the other device -- some of the other devices, for
18 example, that you looked at, there was an HP Pavilion. Do you
19 recall that device?

20 A. I do.

21 Q. And do you recall that was given to the government as
22 part of a consent search?

23 A. I don't know exactly how it was given over.

24 Q. If you don't, that's fine.

25 A. I don't know.

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1 Q. Are you aware of whether or not anything -- any consent
2 search or any items were consensually given to the government
3 by Kimberly Tatum?

4 MR. CERVANTES: Objection, speculation.

5 THE COURT: If you know.

6 THE WITNESS: I do not. I do not know. I know that
7 there were items -- I do know there were items given over. I
8 do not know anything else other than that.

9 Q. Okay. There was another -- there was a series of
10 thumbnails as well of some of the -- these morphed images,
11 right? I believe they were government exhibits as well.
12 These were -- you testified that they were accessed on
13 9/18/2021, all of which were, according to the screenshots,
14 about 4:20 -- 4:21 PM on the 18th of September. Do you recall
15 that?

16 A. If you can bring it up, I can...

17 MR. AMES: I have it as 4E4.

18 MR. CERVANTES: 4E4 is not admitted.

19 MR. AMES: Or 4E8.

20 MR. CERVANTES: No, not admitted.

21 MR. AMES: How about -- I'm sorry. How about 4F13,
22 that's been admitted?

23 MR. CERVANTES: Yes.

24 Q. All right. So here's just another example. Last
25 accessed date. There are a number of these that have 9/18,

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1 4:21 PM as last accessed, correct?

2 A. Correct.

3 Q. And these are, again, not that -- you don't -- you don't
4 know who accessed -- or rather, sorry. The access just means
5 that a device was plugged into another device and the computer
6 accessed whatever that thing was, correct?

7 A. So, yeah, under the user account, yes, sir.

8 Q. And there would similarly be presumably for the Western
9 Digital hard drive because you talked about that as well, and
10 the government was matching up some of these file names from
11 the Mac, again, that don't have any even thumbnail attached to
12 it, to something on the Western Digital drive and such. So
13 that device as well would, the argument is, create some of
14 these same type of thumbnails if you pop something in, right?

15 A. Are you referring to the Passport?

16 Q. Yes.

17 A. I do know that drive was encrypted. I don't know how
18 QuickLook works for encrypted drives. So I would not know
19 without somebody having the password to the encryption on the
20 Western Digital My Passport.

21 Q. Okay. I guess what I'm saying is, is it -- in your
22 investigation and analysis here, there's a claim, for example,
23 IMG_3666.MOV, among others, that have thumbnails or cache
24 stuff on other devices, but others -- why is there not any
25 other thumbnail or -- for some of these pthc things? Why is

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1 there no new thumbnail or anything created?

2 A. I don't know.

3 Q. Is it because they don't exist on the Western Digital
4 hard drive?

5 A. They are not there. I don't know why they're not there.
6 They're not there.

7 Q. So again, computer hard drive, regardless, no images.
8 It's just some words. That's all it is.

9 A. For the pthc search, yes. It's folder paths and file
10 names.

11 Q. And the government has presented a lot of stuff over the
12 past day here, images from these devices you're talking about.
13 What is preteen hardcore? What's a preteen?

14 A. Preteen is anybody under the age of what I would assume
15 to be 13.

16 Q. And hardcore, you don't have to get too descriptive, but
17 pretty graphic hardcore sexual stuff, not just kind of Cinemax
18 softcore kind of stuff, right?

19 A. I would assume that hardcore means hardcore, yes, sir.

20 Q. And so there's been no preteen hardcore put into evidence
21 so far?

22 A. Outside of the search terms? There have been images of
23 potential child pornography, so I don't know exactly, like...

24 Q. Something you describe as hardcore -- there's no preteen.
25 There's no hardcore. There's images that have been introduced

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1 or that you've investigated, but nothing that would --

2 MR. CERVANTES: Argumentative, vague, and compound.

3 THE COURT: Well, let's wait for him to finish.

4 MR. AMES: I'll just withdraw, Your Honor.

5 Q. You said you've done lots of reviews of thousands and
6 thousands of devices, correct?

7 A. Correct.

8 Q. You've seen a lot of bad stuff in your day, fair to say?

9 A. Unfortunately, yes, sir.

10 Q. You and I have sat down together and watched a lot of bad
11 stuff, correct?

12 A. Correct.

13 Q. Not in this case. Others, just to be clear.

14 But as part of your job, you're seeing a whole lot of
15 things, sometimes multiple times same images, right?

16 A. Correct.

17 Q. On other -- you might three, four, five years apart see
18 the same series of photos, like you mentioned Vicky or
19 something, or some other ones, right?

20 A. Correct.

21 Q. Like pornography's general definition, you kind of know
22 it when you see it. Or that's obscenity, rather. But you
23 kind of know it when you see it. With pthc do you kind of
24 know it when you see it?

25 A. Preteen hardcore has been associated with images, in my

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1 experience, with what you're referring to as hardcore images,
2 but also just images of teens standing around nude or doing
3 sexual acts to their self and so on. So preteen hardcore does
4 not mean every image you see is going to be a hardcore version
5 of pornography with a child.

6 Q. Understood. So it's a search term, but it's not
7 necessarily always exactly descriptive of the underlying file
8 or image, is what you're saying, right?

9 A. So preteen hardcore does to me represent child
10 pornography, in my training and experience, but it does not
11 mean that everything you see is going to be hardcore
12 pornography.

13 Q. Understood. Because sometimes it might be people
14 standing -- sometimes it might not even be pornography,
15 correct?

16 A. I don't know that. Every time that I have seen it
17 outside of one time -- or a few times has been children,
18 whether they are standing, whether they are with their legs
19 spread, whether it's hardcore, whether it's sexual acts.

20 Q. Well, what's an example of when it wasn't?

21 A. So there was one time or a few times -- it's very rare --
22 that you will see an image that has the term pthc in it, but
23 it is embedded in a lot of other terms. I don't want to say
24 the terms here in court unless you need me to, but it is --
25 you'll have terms that associate itself with adult

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1 pornography. So you'll see, like, five or six terms that are
2 associated with adult pornography and then you'll see pthc.
3 And when you see that, sometimes you'll see pthc, but you know
4 it's going to be adult pornography by the terms that it is
5 with. And that's where I've seen it on just very, very few
6 occasions.

7 Q. There might be an example of something being mislabeled,
8 right? Like it's labeled this, there's a file name, but the
9 actual file doesn't match the description fully.

10 A. Can you be more specific?

11 Q. Well, you just kind of gave an example, right? You said
12 it's got some adult stuff, but it has pthc in there, so that
13 doesn't -- you're saying that there's -- you clicked that at
14 one point in time in another case, you opened it up and it
15 wasn't pthc, it was adult porn, right?

16 A. So pthc being a term for child pornography. No, it was
17 adult porn on those few occasions.

18 Q. So all I'm saying is that a file name doesn't designate
19 what the file is. You'd have to look at it to confirm, right?

20 A. Correct.

21 Q. Now, there's some other terms and stuff that I think you
22 mentioned either between yesterday and today. There was Loli
23 stuff or --

24 A. Lolita.

25 Q. Lolita, yeah. What do you know about any Lolita stuff?

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1 A. So Lolita, when you look at, like, LS models, it
2 starts -- when you see LS models we talked about, it can be
3 the Lolita series. I don't exactly know what Lolita means.
4 But when you see LS models, the series of images usually
5 starts with one or two females, maybe multiple, and it starts
6 off to where they're posing; and then, you know, sometimes --
7 usually it leads into sexual acts either between the two
8 underage females or with somebody or an adult.

9 Q. And are there -- that term, is that -- is that -- is
10 Lolita or some variant of it a term that comes up a lot in
11 other ways in your cases?

12 A. Sure, I've seen it.

13 Q. What are some examples maybe -- if you remember, what are
14 some other examples where you see that term or something
15 similar come up?

16 A. I mean, the amount of images we look at, I do not
17 remember the names of every one of them so I can't answer that
18 question. I don't know.

19 Q. Like L-o-l-i, like Loli something -- hyphen something, is
20 that one that might come up?

21 A. I don't know.

22 Q. Or like -- are you familiar with, like, Lolicon or
23 anything like that?

24 A. No.

25 Q. Are you familiar with -- hold on.

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1 Are you familiar with any, I guess, non --
2 non-pornography but graphically -- graphically created
3 pornography? Have you ever come across that? Like completely
4 CGI generated, for example.

5 A. Like an anime?

6 Q. Yes.

7 A. Like a cartoon?

8 Q. Or something like that, yes.

9 A. Yeah, I'm familiar with it.

10 MR. AMES: The Court's indulgence real quick, Your
11 Honor. I'm sorry.

12 (Pause.)

13 BY MR. AMES:

14 Q. Have you had other cases in the past, I guess, that
15 involved any anime? What is anime, I guess is the first
16 question.

17 A. Anime is just basically a cartoon. I mean, it can -- it
18 does not have to be pornography. But it is, like, Japanese
19 animation or cartoons that can be a normal cartoon. Sometimes
20 it can depict, you know, certain sexual scenes with girls that
21 may appear underage. Sometimes they are where they are not
22 developed or girls that have a very young face that are very
23 developed. So anime can literally be all over the place.
24 It's just a cartoon.

25 Q. In general, I guess -- you can watch anime on Netflix,

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1 right, normal anime?

2 A. Correct.

3 Q. Right?

4 There's a subculture, a subset, that is a bit deranged,
5 fair to say?

6 A. I mean, it is animated, sir.

7 Q. So it's, I guess, a specific kind of subgenre that
8 involves images that, as you said, depict young or undeveloped
9 people doing sexual things, for example?

10 A. Not all the time. I mean, there is normal anime that, as
11 you say, you can watch on Netflix that has none of that.
12 There is anime that is just like you're watching a movie, a
13 cartoon movie. But anime spans all the way down into child
14 pornography, what depicts child pornography.

15 Q. But anime -- the implication with anime, though, it is
16 animated, right? It's not -- when it's anime, it's not
17 live-action images. It's cartoons. It's drawings.

18 A. Drawings.

19 Q. In your cases that you've done, have you in other cases
20 encountered that kind of thing in your searches?

21 A. Of course.

22 Q. Did those have suggestive names sometimes that are
23 like -- describe what's in the images?

24 A. I don't recall at this time. I honestly do not know.

25 Q. That's okay. I'm asking about prior cases.

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1 So in total here, you know, there's the MacBook device
2 that, I think by all accounts, doesn't have any original or
3 actual images. The only thing that's on this MacBook that we
4 can glean is that there's some of these thumbnail things in
5 the cache folder, correct?

6 A. You're referencing images?

7 Q. Yes.

8 A. Correct.

9 Q. And then the -- there's a thumb drive that has these
10 folders that you mentioned that had the morphed images, right?

11 A. The morphed or altered images, yes, sir.

12 Q. And what can you tell us about the specific -- any
13 specifics that you're aware of or researched about the
14 morphing process? How does that site do that?

15 A. Honestly, I do not know. I did go to the site to try to
16 familiarize myself with it. And I don't know outside of that
17 it is a computer program, an AI program, that, as they claim,
18 nudifies images.

19 Q. And ostensibly what it sounds like from my understanding,
20 you can take any image of a clothed person, or so it claims,
21 and put it to this site and it will generate a new image that
22 makes the subject appear to be naked, correct?

23 A. So I never tried it. I don't know what it does with the
24 original. But it does -- you will give a source -- from the
25 way I understand it, and I have not tried it, is you do give a

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1 source image and then it will produce an image from the source
2 that is, they call it, nudified.

3 Q. And so -- I mean, we've reviewed here today a series.
4 You matched them up side by side: image one, image two;
5 clothed, unclothed.

6 The image that's being populated, the best we can tell,
7 is not -- it's AI generated. It's generated by some sort of
8 code or AI or whatever it may be, right?

9 MR. CERVANTES: Objection. Asked and answered.

10 THE COURT: Overruled. Go ahead, take one more
11 shot.

12 THE WITNESS: Yes, sir, a computer program. So it
13 is a computer program that alters the image.

14 Q. So where does -- do you know where the -- this new image
15 that's being created or being -- the nudified part where
16 they're talking about what looks like a naked person now, do
17 you know, are they drawing that from a pool of naked people
18 and adding them on top or do you know in any fashion how it
19 works?

20 A. I do not.

21 Q. Or if it's literally drawn by a computer just from
22 scratch in some fashion?

23 A. I do not know.

24 Q. And it seems, at least in the examples, to do a decent
25 job of finding the -- finding the right spots to add the

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1 nudity, at least in the examples we've seen, correct?

2 A. Sure.

3 Q. Perhaps with the exception of the one where there's kind
4 of floating heads over here with the prom photo or something.

5 A. Correct.

6 Q. But -- so do you know if there's any user input on that
7 or is it just the kind of thing, in your review of this, just
8 pop it -- pop it in and click it, set it, forget it kind of
9 thing?

10 A. I don't know.

11 Q. All right. Or any -- is there anything else you gleaned
12 at all that I've missed about how it works or looked into what
13 it does otherwise?

14 A. I don't believe so.

15 Q. All right. The HP Pavilion device, this was -- I guess
16 this is, fair to say, an older kind of computer, a few years
17 old, the HP Pavilion?

18 A. I really didn't look into it. I don't know the answer to
19 that. It is a desktop.

20 Q. All right. Did you do -- you did an investigation of
21 those -- the contents, though, looking for potential
22 pornographic materials, though, correct?

23 A. On this one I just reviewed the flagged images.

24 Q. Okay. So you reviewed -- so you didn't do a full
25 forensic analysis. You reviewed flagged images.

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1 A. So the full forensic analysis was completed as in making
2 a report for the special agents to review. They reviewed the
3 report and flagged the images.

4 Q. Okay. So in other words, are you saying that you -- you
5 did an analysis, provided the results. They flagged a couple
6 of them after they reviewed it?

7 A. So I did not flag anything in here. They flagged it.

8 Q. Okay. So you -- you copied the thing. You did your
9 normal routine with regard to getting the data. You went
10 through and did kind of the searches that you do. And there
11 was nothing that was flagged by you at that time.

12 A. So the only thing that was flagged by me on the HP
13 computer was the term of pthc in the word wheel. I ran a
14 search term for that or an index search for it.

15 Q. You're right. So there was that. But nothing else other
16 than that was flagged by you at that time, correct. There was
17 nothing that popped up.

18 A. To the best of my knowledge, yes.

19 Q. You provided that report -- do you remember roughly when
20 you did that?

21 A. I do not.

22 Q. Was it recent or was it, like, last year, 2021?

23 A. I mean, it depends on your definition of recent. Within
24 a couple of months maybe. I don't remember.

25 Q. Okay. But then at some point in time, you know, you

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1 turned over your preliminary categorizations to the agents and
2 then you got it back later on to do kind of the official
3 work-up once you had some images flagged by them, right?

4 A. I don't remember flagging anything in here. I could
5 have, but I do not remember. I just reviewed the files that
6 were flagged.

7 Q. Okay. And the files that were flagged, was it the two
8 files that were introduced in court?

9 A. The two Vidweb, I think they're named.

10 Q. Yeah. Were those the only files that were flagged to
11 your recollection?

12 A. To my recollection.

13 Q. So, you know, you did your analysis and produced a report
14 to come to court. As part of the investigation, is there
15 anything else that's done to try and identify or find who the
16 people might be in any of the images?

17 A. You would have to talk to the agents about that, but I do
18 know they submit --

19 MR. CERVANTES: Objection, speculation.

20 THE COURT: Sustained.

21 Q. Did you have specific knowledge in this case of whether
22 or not any agent has sent -- specific knowledge of agents
23 sending off requests for -- to any agency to try and identify
24 anybody?

25 MR. CERVANTES: Objection. Calls for hearsay.

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1 THE COURT: Overruled. Are you aware of any such
2 requests?

3 THE WITNESS: I am not.

4 Q. What's an example of a place that that -- if a request
5 were to be made, where would you send it?

6 THE COURT: Sustained. He's already said he doesn't
7 know whether any were sent or not.

8 MR. AMES: I'm sorry, Your Honor. I may have
9 misspoke.

10 Q. Are you aware of -- what's an example of a place where
11 the government might do --

12 MR. CERVANTES: Objection.

13 THE COURT: Sustained, relevance

14 Q. What is NCMEC?

15 MR. CERVANTES: Objection.

16 THE COURT: Sustained.

17 MR. AMES: I'm sorry?

18 THE COURT: Sustained, relevance.

19 MR. AMES: To ask what NCMEC is?

20 THE COURT: Ask another question, Mr. Ames.

21 MR. AMES: What's the objection, I'm sorry? It's
22 relevance?

23 THE COURT: Mr. Ames, there was an objection that
24 was sustained.

25 MR. AMES: I'm sorry, Your Honor. I understand.

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1 BY MR. AMES:

2 Q. Do you play any role or do -- as part of the
3 investigation, do you do anything or play any role in trying
4 to identify victims?

5 MR. CERVANTES: Objection.

6 THE COURT: Overruled.

7 THE WITNESS: I do not play a role in identifying
8 victims.

9 Q. Who does that part?

10 A. The case agents.

11 Q. In this case who did that part?

12 A. I don't know.

13 Q. How many agents were involved in this case?

14 A. Two.

15 Q. Who were they?

16 A. Special Agent Marisa Brown and Special Agent Scott
17 Atwood.

18 Q. So then presumably one or the other, or both, would be
19 tasked with trying to determine identities of any known or
20 potential victims.

21 MR. CERVANTES: Objection. Calls for speculation.

22 THE COURT: Sustained.

23 Q. Would it be anybody else other than them?

24 MR. CERVANTES: Objection. Calls for speculation.

25 THE COURT: Sustained.

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1 Q. As part of your review of devices, other than looking --
2 you know, some of the stuff you talked about already:
3 searching for certain search terms, looking for indicia of
4 pornographic titles and such. Is there anything else that
5 you're looking for beyond what we've talked about in general?

6 A. To flag potential pornography I look at the index
7 searches and actually look at the images themselves.

8 Q. Are there any other searches done or any other kind of
9 investigation done traditionally or is that mostly what it is?

10 A. Investigation on my part? I just focus on the forensics
11 of it. So outside of running the index searches, flagging
12 what I see as potential child pornography, that is either
13 handed -- or then it is handed over to the case agent for
14 review.

15 Q. Is there any other software that you use -- you mentioned
16 AXIOM. That's a -- I'm confused about this, honestly. Is
17 Magnet the company and AXIOM the software?

18 A. Correct.

19 Q. And is that the software that the government uses
20 traditionally in these cases, or some version of it?

21 A. There's multiple software out there that the examiner
22 chooses to use. I choose to use Magnet AXIOM, or we'll call
23 it AXIOM.

24 Q. So there's some other options you can use, but that's
25 your preferred one, I guess.

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1 A. Correct.

2 Q. And are there other things Magnet -- I guess AXIOM itself
3 does or other programs or applications by Magnet that you use
4 and utilize in these investigations even if it's rare, I
5 guess?

6 A. I don't think so.

7 Q. When you're in AXIOM, other than searching indexes,
8 there's a lot of things you can do, correct?

9 A. As far as the index searches?

10 Q. No, I'm saying other than the index searches, there's a
11 lot of stuff that you can look at in the AXIOM software when
12 you're analyzing a hard drive, for example.

13 A. Correct.

14 Q. Does the program, like, categorize and tag things or you
15 can tag things?

16 A. So there -- the program will pick out hash values that it
17 will tag that has previously been tagged, and then also I will
18 go through and flag or tag images myself.

19 Q. And you can search for types of events and such, right?
20 You can actually -- sorry. You referred to artifacts earlier
21 yesterday.

22 A. Correct.

23 Q. And an artifact is just a thing on a computer and it can
24 be a variety of things, right?

25 A. Anything on the computer.

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1 Q. So it can be an image, it can be a thumbnail, it can be a
2 text document, it could be a record or a log of something,
3 right?

4 A. Correct.

5 Q. And you can search and categorize all kinds of things,
6 including quick view thumbnails that are no longer viewable by
7 a normal person, right? As you said earlier.

8 A. Correct.

9 Q. So in your software you could -- did you do any other
10 investigations outside of, you know, like we talked about, an
11 index search here or looking for attribution and such? Was
12 there any other -- did you look at anything else on the drives
13 that are outside of that?

14 MR. CERVANTES: Objection. Asked and answered.

15 THE COURT: Just answer the question.

16 THE WITNESS: Can you repeat it?

17 Q. Other than the stuff you've talked about, did you use
18 AXIOM to review at any time or look for anything other --
19 outside of just specifically looking for images of
20 pornography?

21 A. So when we first got the computer and did our forensic
22 analysis of it, my first step is to look for child
23 pornography. Outside of that there are -- we look for
24 attribution which did lead into the documents, PDFs, and files
25 of that nature.

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1 Q. You mentioned too -- you said MD5. What is that?

2 A. It's a hash value. There are different types of hash
3 values. There's MD5, SHA-1, SHA-256. The FBI uses MD5 for
4 their hash value, their hash algorithm.

5 Q. And these -- I'm not going to put words in your mouth
6 because you are the expert in this, but that is basically kind
7 of like a fingerprint of an image that stays with the image
8 and you can hypothetically identify an image without even
9 seeing it based on that value, right?

10 A. As long as the image has not changed.

11 Q. Right. Even one pixel, I think you said the other day.

12 A. Would completely change it.

13 Q. Right. So you can basically have one image here, one
14 image there. If the hash value is the same, then we know the
15 image is the same, right?

16 A. Correct.

17 Q. And this is utilized often by the FBI in their
18 investigations, correct?

19 A. MD5 values are used to identify images or say that these
20 two images are the same.

21 Q. Okay. And you mentioned in AXIOM, AXIOM will tell you
22 what those hash values are, correct?

23 A. They will.

24 Q. And you can even do that on your own computer, right?
25 You can go to the more details or whatever in Windows, or

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1 something, and it can show you what your MD5, SHA, other
2 values are. There's a process for that, right?

3 A. I don't know that process.

4 Q. It's not a secret code, though. It's attached to the
5 image. It's populated.

6 How does that work? How does the image get that code
7 attached to it?

8 A. So it's some algorithm that, you know, I'm not aware of.
9 But it is a hash value.

10 Q. So when you're going through and you're doing your
11 analysis, as part of that analysis, seeing these MD5 hash
12 codes -- or I think you said SHA, is that S-H-A-H?

13 A. Just S-H-A.

14 Q. S-H-A. And that's another similar type of code, I guess?

15 A. It's a different hash value. It's a different algorithm

16 Q. So that will populate.

17 Does AXIOM have the option or does it automatically flag
18 for you any hash values that are problematic in any fashion?

19 A. So when it compares the hash values from the database,
20 you have to set it to look for the hash values.

21 Q. What's the database?

22 A. The database is just items that have been flagged prior
23 by other agents. We can keep a database of them to make
24 review of this faster.

25 Q. There's a database. Is that like a local database here

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1 like in the Western District or FBI in general or...

2 A. It's a database at FBI Charlotte.

3 Q. FBI Charlotte.

4 So, for example, you guys get a case and let's say, for
5 example, you find a bunch of illegal images and someone gets
6 convicted and that all happens. Then -- and these images
7 you've never seen before. How do you add those to the
8 database?

9 A. So if an image is flagged -- I think this is the question
10 you asked. If an image is flagged that the database did not
11 recognize, it is flagged as potential child pornography and
12 sometimes it's updated. You have to click that it's updated.
13 Or other times it's not. It's what we choose. But you would
14 have to update the database with the new hash values to add to
15 it.

16 Q. Okay. And so then from that point on -- so let's say,
17 for example, last year you had a case. You got an image that
18 you have determined is definitely child pornography. You've
19 added it to this database. A year later you get another case
20 and you can see that there's a similar -- exact same hash code
21 in the new case that matches that one from the database.

22 A. Sure.

23 Q. Is that more or less how it works?

24 A. Yeah. And then you would have to go visually review it.

25 Q. Right. So -- but what it initially indicates to you is

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1 that, hey, this hash code matches this known image hash code
2 and it's popping up and saying, hey, check this one because
3 this one definitely matches one we already know about.

4 A. I wouldn't say know. I would say potential.

5 Q. Okay. And then you verify by other review.

6 A. The case agent would probably verify by other review.

7 Q. Understood. But it's helpful because let's say --
8 actually, let me back up real quick. You get a lot of these
9 cases. Fair to say that the number of images that you uncover
10 and find in these cases often is quite substantial?

11 A. They are.

12 Q. And so -- and you said before this is a lot of repeat
13 sometimes.

14 A. Correct.

15 Q. So there's similar -- there's videos you've seen more
16 than once, right?

17 A. There are.

18 Q. And you don't even need the hash code. You already know
19 probably before you open it probably what it is because you've
20 seen it eight times.

21 A. Potentially.

22 Q. Particularly in a large case where there's a ton of
23 images, these MD5 hash codes can really be helpful because
24 rather than you have to go through or an agent go through and
25 review them one by one, it will give you kind of a cheat

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1 sheet, like, check these ones first because these are highly
2 likely to be something that another person has reviewed and
3 indicated already is illegal.

4 A. So when they are tagged with AXIOM, the way I do it, is I
5 will go through them at the beginning. Those are removed.
6 And then I will go through the images that have not been
7 flagged and we'll flag the other ones. And then at the end
8 we'll do a review of all the flagged images.

9 Q. Okay. So basically you separate those out first. Keep
10 the ones that are flagged that have a match value, I guess, to
11 your -- the FBI database in Charlotte. You look at some of
12 the other stuff that wasn't auto flagged. And then at the end
13 you kind of put it all together and review the whole list; is
14 that correct?

15 A. The hash value is set aside at first. Then I will flag
16 the rest of them or attempt to. And then we will go through
17 and review the -- all of them together.

18 Q. Okay. And so this database that Charlotte has, is that
19 shared with any other offices? Is there any connection?
20 Like, does another FBI agency on the other side of the country
21 share their information and hash codes with you?

22 A. No. We keep it -- the database that we have we keep here
23 in Charlotte for the Western District.

24 Q. Okay. And AXIOM is only going to make a match or
25 populate with something in your database or is it possible or

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1 do you in cases connect it to any other databases at all?

2 A. So there is a database that I brought into ours. I
3 created it with what we call golden hashes. They are hashes
4 that are not -- let's say you did a fresh install of Windows.
5 With a fresh install of Windows, you have all these icons that
6 we know to be pure. So we'll create a hash of that, or the
7 program will, and those hashes are added to our database. So
8 we remove the ones we know are not.

9 Q. Understood. So like welcome.jpeg, or something, like
10 when Windows pops up.

11 A. Correct. On a desktop you'll normally get it when you
12 start up.

13 Q. So that's kind of a filter process that you created to
14 make -- to weed out stuff that you don't really need to be
15 concerned with.

16 But as far as any, like, contraband or things that have
17 been marked illegal by another person, is there any other
18 database that AXIOM -- when you do your investigation, that
19 AXIOM can connect to to check for matches?

20 A. Not that I'm aware of.

21 Q. Okay. And in this case, you reviewed at least these
22 ones. And there's more, right? I don't remember exactly how
23 many. Did you do the MD5 hash match search for all this
24 stuff?

25 A. AXIOM does it automatically.

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1 Q. So it automatically did it. Did you get any matches for
2 these MD5 hash codes?

3 A. I do not recall. Honestly, I do not.

4 Q. Okay. But I guess in your investigation and preparing
5 your reports, there was never a note that, hey -- you never
6 noted it as happening.

7 A. I do not remember if it happened.

8 Q. Okay. But fair to say it wasn't -- you didn't find a
9 hundred matches.

10 A. I do not know.

11 Q. Are you sure that there were any?

12 A. I do not know.

13 Q. So you got these -- these devices, they've got all these
14 file paths, all this stuff you guys have been talking about
15 here today, and your system automatically checks it for images
16 of contraband, and there's -- you don't remember if any of
17 them matched up.

18 A. So the file paths the system is not going to check for
19 hash values because they are not images.

20 Q. So they don't even have a hash value attached to them
21 either, that string of texts.

22 A. Not that I'm aware of.

23 Q. But the thumbnails, would they have one?

24 A. The thumbnails are generated by the OS and they can
25 actually be different.

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1 Q. Does it make a new hash value?

2 A. It could.

3 Q. It could. Does it sometimes not?

4 A. It's going to make a hash value whether it matches a
5 thumbnail that we have seen before or not. It depends on the
6 OS.

7 Q. But if it's a -- you know, if it's the same image, same
8 image, that would populate. And none here that you recall,
9 right?

10 A. I do not recall any of the hash values being marked or
11 flagged.

12 Q. Approximately how many images, just in general, not
13 anything supposedly child pornography, but pornography in
14 general, do you have an approximation of how many different
15 images were found in this case?

16 A. So during my review for the potential child pornography,
17 I do not note the adult pornography or what the count is, so I
18 do not know how many were images of adult pornography.

19 Q. Is it a lot?

20 A. I do not know.

21 Q. You don't know?

22 A. I really don't know.

23 THE COURT: Can we have a brief sidebar, please.

24 (Sidebar conference as follows:)

25 THE COURT: Mr. Ames, do you have a guess as to how

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1 much longer your cross is going to be?

2 MR. AMES: Not too much longer.

3 THE COURT: Can you quantify that?

4 MR. AMES: You know me. I can't stop talking
5 sometimes.

6 THE COURT: To that end, you spent 45 minutes
7 establishing that none of the images that came off these
8 devices were known images. That could have been done in two
9 questions and 60 seconds. Okay. Just a little gratuitous
10 advice.

11 MR. AMES: No, I get it.

12 THE COURT: What I'm trying to wonder is whether we
13 should -- if you're going to go another hour, I'll take a
14 break sooner than that. But if -- I want you to finish if you
15 can, but I don't want to starve to death either.

16 MR. AMES: Yeah. I'm trying to think what I --

17 THE COURT: I don't want to interrupt your cross if
18 it's almost over. If it's going to have to be interrupted
19 anyway, then I'll do something different.

20 MR. AMES: I think I'm getting close to the end.

21 THE COURT: Thank you.

22 MR. AMES: I won't make promises, but I'll try.

23 (End of sidebar conference.)

24 THE COURT: Just scheduling issues, folks. I can
25 look at the clock as easily as you can.

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1 Go ahead, Mr. Ames.

2 CROSS EXAMINATION (Cont'd.)

3 BY MR. AMES:

4 Q. The number of images, pornography in general,
5 encompassing all of it, how many you weren't sure.

6 A. I do not know.

7 Q. Did you review any images that were not child pornography
8 or alleged child pornography?

9 A. I did.

10 Q. Okay. Do you recall when or how many, anything like
11 that?

12 A. I really cannot put a number to it. There are images
13 that I reviewed that are not child pornography.

14 Q. Okay. Fair to say that it was the vast majority of
15 images that you reviewed?

16 A. So the images that I reviewed are based off the -- the
17 ones I reviewed are based off the index searches, so I took
18 those where it led me. So those are the ones that I vastly
19 reviewed. There are images, videos inside of those folders
20 that are not child pornography. But to give it a count, I do
21 not know.

22 Q. Okay. And in this case -- well, so the index search
23 you're referencing here, what was the index search that you
24 looked for that resulted in you looking at some images?

25 A. For which device?

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1 Q. Any of them. Like, for example, the file names, from
2 what I can see, are mostly like IMG_99 whatever.

3 A. So when we looked at the devices, the thumb drive, the
4 forward paths, the CPT, of course when we found those images,
5 we decided -- or I decided to see if there was any evidence on
6 other devices so I searched for CPT or EMOR. That's where I
7 did see some on the devices.

8 As far as the IMG_3666, those were reviewed based off GPS
9 coordinates to a place up in Maine. Once I saw that, we
10 started reviewing that because GPS coordinates can lead you to
11 certain images, and that's when I found that video.

12 Q. Okay. And so that was sort of the point here to get --
13 that's sort of, again, from here to here to here based upon as
14 the investigation flows.

15 Were there other search terms -- I know pthc is one.
16 Were there any other search terms that were used in that index
17 search on any device that you used here?

18 A. I used pthc. I also searched the image name, like
19 IMG_3666 forward names. Those are a few that I remember
20 searching.

21 Q. I guess -- I'm sorry, I suppose I mean more generic.
22 Other than pthc, is there another term that -- like Lolita.
23 Is there something else you looked for?

24 A. No, I did this one just pthc. I did not search for any
25 other because once I saw the folder path of pthc, a lot of

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1 those terms that I usually search for were located in the file
2 paths so I knew that they would hit also.

3 Q. Understood. That makes sense.

4 Is there -- is there any other -- is there any other --
5 any other device, other than the ones that are put into
6 evidence, that contain any indicia or appear to show any sort
7 of child pornography, or alleged, that you've seen that
8 haven't been put into evidence today?

9 A. I believe everything has been put into evidence.

10 Q. No other device that you are aware of has any alleged
11 pornographic materials.

12 A. Outside of the screenshots of the thumb drive, I do not
13 know of any devices that have any pornographic material on
14 them.

15 Q. Okay.

16 A. Or potential child pornography material on them.

17 Q. Understood.

18 When you say screenshots, what are you referring to?

19 A. So it appeared that either somebody took a picture of the
20 screen or took a snapshot of the screen itself of the images
21 that I saw.

22 Q. Are you -- a screenshot of -- can you -- I'm sorry, can
23 you be more -- elaborate a little bit. Like a picture of a
24 screen --

25 A. Like literally taking your camera and taking a picture of

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1 the screen.

2 Q. Okay. And what was that screen?

3 A. It looked like a Mac and it had some images of the images
4 that we have been looking at today.

5 Q. Okay. So like the deepfakes or some other ones
6 potentially --

7 A. The ones of the altered or modified images.

8 Q. Okay.

9 A. That I remember.

10 Q. Got it.

11 So there's someone with a phone that takes a picture of a
12 computer screen like this?

13 A. That's what it appears. I did not analyze it. I'm just
14 going off what it appeared.

15 Q. And do you know -- I'm sorry, you said that. That was on
16 a thumb drive?

17 A. That was on a thumb drive.

18 Q. That's not in evidence, correct?

19 A. It is in evidence.

20 Q. It is?

21 A. Yes. Evidence as in our evidence storage at the FBI.

22 Q. Oh, you're right. I meant in evidence at the trial.

23 It's not been admitted as an exhibit, correct?

24 A. It is not in front of me.

25 Q. Okay. Is there any attribution to that thumb drive that

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1 you're aware of or have done?

2 MR. CERVANTES: Objection. Calls for speculation.

3 THE COURT: Overruled.

4 THE WITNESS: I did not look for attribution on that
5 thumb drive. I did not forensically analyze it.

6 Q. Okay. Did you analyze it even if it's not forensic?

7 Have you looked through some of the documents for images on
8 it?

9 A. I don't remember the contents of the documents. I just
10 remember there's some emails and some screenshots or images
11 from a phone or a camera taking a picture of the screen.

12 Q. Did you do any analysis of when those pictures were
13 taken, by whom or anything?

14 A. Did not perform any forensic analysis on that thumb
15 drive.

16 Q. Do you know where that thumb drive came from?

17 A. Stated, I believe -- I believe it was from Kimberly
18 Tatum.

19 Q. So when did you learn -- when did you learn that the
20 government had that?

21 A. I do not recall.

22 Q. Was it before or after you did an attribution of this
23 device and linked it to David Tatum?

24 A. I do not recall. I'm trying to put it together. I just
25 do not recall.

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1 Q. I understand. It's been a long haul, I understand.

2 But fair to say, that -- if there's -- if the government
3 is in possession of some pictures of a computer screen showing
4 the evidence we're talking about that was given by Kimberly
5 Tatum, does that imply that she has access to this device?

6 MR. CERVANTES: Objection. Calls for speculation.

7 THE COURT: Sustained.

8 Q. Are you -- in your analysis did you -- did you observe
9 anything odd or any anomalies on any of these devices out of
10 the norm?

11 MR. CERVANTES: Objection, vague.

12 THE COURT: Sustained. Be a little more specific,
13 Mr. Ames.

14 Q. Did you find that there was any spyware installed on any
15 of the devices?

16 A. I did not.

17 Q. Did you look for that?

18 A. I did not.

19 Q. Are you aware whether or not there was any on any device?

20 A. I'm aware that something was installed on a device.

21 MR. CERVANTES: Objection. Calls for hearsay.

22 THE COURT: Well, what he's said right now doesn't,
23 so overruled.

24 Q. Not repeating anything anyone said because that's
25 hearsay, but what is your understanding or what is your

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1 knowledge of it?

2 A. I have no knowledge.

3 MR. CERVANTES: Objection. Calls for hearsay.

4 THE COURT: Sustained.

5 Q. In AXIOM -- let's say hypothetically there was something
6 like spyware or malware or something on the device. Is that
7 something AXIOM could search for?

8 A. I do not know. I know that there is an option -- or
9 there is a category to look for certain types of things, but I
10 do not know what is in the database that it might find. So I
11 don't know if it's antivirus or anything to delete evidence,
12 that kind of thing.

13 Q. Are you aware of any sort of programs -- I'm using the
14 term spyware as kind of a blanket term here, but any program
15 spyware like that can do things like remotely access a device
16 or delete stuff or manipulate evidence or data? Is there
17 anything you're aware of program wise like that?

18 A. Personally?

19 Q. Yes.

20 A. There are --

21 MR. CERVANTES: Objection, relevance.

22 THE COURT: Let's ask the question, did you locate
23 any such software on any of the devices you examined?

24 THE WITNESS: No, sir, I did not.

25 Q. Did you look for it?

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1 A. No, sir, I did not.

2 Q. But you're aware of something, there is an indication of
3 something, but you never looked for it.

4 MR. CERVANTES: Objection.

5 THE COURT: Asked and answered.

6 MR. AMES: Okay.

7 Q. I just asked is there -- are there any examples that
8 you've seen or are aware of that can remotely access a device
9 and, for example, as a result, create a QuickLook thumbnail?

10 MR. CERVANTES: Objection. Asked and answered,
11 vague, speculation --

12 THE COURT: Sustained.

13 MR. CERVANTES: -- relevance.

14 THE COURT: Sustained.

15 Q. Have you ever heard of TeamViewer?

16 A. Have I heard of Team --

17 MR. CERVANTES: Objection.

18 THE COURT: Overruled.

19 THE WITNESS: Have I heard of TeamViewer?

20 Q. What's your understanding of what TeamViewer is, your
21 knowledge of it?

22 A. So it's -- to my knowledge, TeamViewer is a program that
23 allows somebody to -- you have to give them access to remote
24 into your computer or just to see your screen or to give them
25 access to it.

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1 Q. Hypothetical, that would allow -- Google Remote is
2 another example. You can do that through Chrome, I think.
3 You can access a home computer from another device through
4 your browser. Have you heard of that one?

5 A. I'm familiar --

6 MR. CERVANTES: Objection, relevance.

7 THE COURT: Sustained.

8 Q. If a person is able to remotely access through TeamViewer
9 or other similar software and things are done on -- remotely,
10 can that create new data on the other desktop device? Like,
11 if I'm accessing my thing at home right now and I'm --

12 MR. CERVANTES: Objection, speculation, relevance.

13 THE COURT: Sustained.

14 Q. Would your investigation in this case indicate to you if
15 there was any remote access or manipulation of any data?
16 Would your -- the way you've researched and done the
17 investigation, would you know or would you not know?

18 A. I did not see any evidence of a TeamViewer or any other
19 remote --

20 Q. I'm aware. But you also didn't look for it, so you don't
21 know.

22 MR. CERVANTES: Objection, argumentative. Asked and
23 answered.

24 THE COURT: It has been asked and answered.

25 (Counsel and defendant conferred.)

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1 BY MR. AMES:

2 Q. They talked briefly to you about creation and modified
3 dates. That's also in some of this metadata. Talked about
4 how it accesses when maybe the device is creating this quick
5 view thumbnail in that case.

6 What about the creation date or -- well, what's that,
7 first of all?

8 A. The creation date of what?

9 Q. A quick view image -- the quick view cache thumbnail that
10 we were talking about earlier.

11 A. If you could show it to me, I can probably answer --

12 MR. CERVANTES: Objection. Asked and answered on
13 direct and cross.

14 THE COURT: Ask a question that I can guess where
15 you're going --

16 Q. So there --

17 THE COURT: -- and then I'll be able to better rule
18 on it.

19 MR. AMES: That's fair, Your Honor.

20 Q. So you talked earlier, I think, about is it like EXIF
21 data or something?

22 A. EXIF data of an image, not of the QuickLook thumbnail
23 cache.

24 Q. Right. So EXIF data, is that something -- can you
25 describe if there's a distinction between a creation date in

JASON WHITT - CROSS

1 the metadata or an EXIF date in the metadata.

2 A. I don't quite understand -- I mean, if you could reword
3 it, I will try to answer it.

4 Q. So does every image have EXIF data?

5 A. A lot of images will retain their EXIF data, but the EXIF
6 data can be stripped out of an image.

7 Q. So sometimes it has it; sometimes it doesn't.

8 Does it always also have -- or presumably always have a
9 creation date as well?

10 MR. CERVANTES: Objection, relevance.

11 THE COURT: Overruled.

12 THE WITNESS: Creation date as when the image was
13 created?

14 Q. I'm just saying -- look, there's been a bunch of metadata
15 that popped up on the screen. I objected to it earlier. I
16 need to know what it is.

17 So there's a creation date on every single one of those
18 documents. There's also EXIF --

19 MR. CERVANTES: Objection, argumentative.

20 THE COURT: I haven't heard a question in there,
21 Mr. Ames.

22 Q. What is the creation date?

23 MR. CERVANTES: Objection, vague.

24 THE COURT: Can you answer that? What is a creation
25 date?

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1 THE WITNESS: What is a creation date?

2 Q. Yes.

3 A. A creation date is when the file was created.

4 Q. And what's the difference between that and EXIF data?

5 A. EXIF data is data about the image to where the EXIF data
6 retains all the creation date, modified date, the model -- or
7 whatever the camera was, GPS coordinates, shutter speed,
8 altitude. So EXIF data retains all that information of the
9 image.

10 Q. So a bit more detailed, fair to say. EXIF data is more
11 than just a date. The creation date is just a date, right?

12 A. Creation date is a date. EXIF data is information about
13 the image.

14 Q. Does the EXIF data also have, like, a date of creation as
15 well or no?

16 A. It does. There's multiple dates of creation within the
17 EXIF data.

18 Q. What are the multiple dates, as an example?

19 A. An example is -- I don't know exactly what it's called.
20 There's a content created date. There's a media created date.
21 Those are the two that I'm familiar with.

22 Q. So sometimes you might see an image that has EXIF data
23 that says creation date this date and then you have a creation
24 date above that that's a different date?

25 A. So inside the EXIF data, yes, you can see something that

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1 was created on a date and then the media created date above
2 that could be different.

3 Q. And then there's an access date also that is different
4 than those, correct?

5 A. The access date is usually with the file or file system.

6 Q. And is there any rhyme or reason why -- you said it can
7 be stripped or something. Is there any rhyme or reason as to
8 why that happens, why one image might have this EXIF data and
9 one might not?

10 A. Some images might not have EXIF data in totality. The
11 reason sometimes it gets stripped is for safety. If you
12 upload a picture to Facebook, I know they strip the GPS
13 coordinates out of it if it is there. So there are reasons
14 why it is stripped out.

15 Q. Okay. Is that something that someone can manually do or
16 is it kind of --

17 A. I'm sure if you have the knowledge, you can manually do
18 it.

19 (Counsel and defendant conferred.)

20 BY MR. AMES:

21 Q. The -- and to be clear, that access date that we've
22 talked about with thumbnails and such tells us just when the
23 device was plugged in. Is there a way to determine if
24 other -- is there any other way to determine whether or not an
25 actual video was actually watched based on that data?

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1 MR. CERVANTES: Objection. Asked and answered.

2 THE COURT: Overruled.

3 THE WITNESS: Repeat the question.

4 Q. Sure. So let's say, for example, we see with some of
5 these images we talked about before access date 9/10/2021, and
6 we went over that earlier. There's two, three in a row that
7 have the exact same access date, exact same access time. Is
8 there any way to determine if these images were actually
9 opened and viewed or not?

10 A. So the only thing we can determine about the QuickLook
11 thumbnail cache is that thumbnails were created from the
12 originals from the external or media plugged into the device.

13 Q. So for instance, there's -- you're aware and familiar
14 with the video in Maine, the shower video, the first one, the
15 one with the cousin.

16 A. The blond female.

17 Q. Yes.

18 A. Yes.

19 Q. So it was indicated that that has a thumbnail on the
20 MacBook, you know, with an access date, right?

21 A. If you could bring it up, I can...

22 Q. What I'm trying to establish here, you didn't find that
23 video on the MacBook, right?

24 A. I did not find that video on the MacBook.

25 Q. So -- nor was there any evidence of it being watched or

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1 viewed on the MacBook, correct?

2 A. So there was a QuickTime Player X PLIST that does
3 reference the folder path for the IMG_3666.MOV, which goes to
4 say that it was played with a QuickTime Player X.

5 Q. Okay. But that's all it says. It doesn't -- can you
6 tell us when someone supposedly watched any of -- any -- on
7 any of these devices, on the MacBook, when somebody watched
8 any video whatsoever? Can you tell us a date and time when
9 that occurred?

10 A. I did not find any dates associated with when they were
11 played.

12 Q. Okay. So there is nothing to tell us when and there's
13 nothing to tell us whether it ever even happened. All we know
14 is that --

15 MR. CERVANTES: Objection, argumentative.

16 THE COURT: Overruled. Go ahead.

17 Q. At one time these devices were plugged in. That's what
18 the evidence tells us. That's the only thing we can glean
19 from it specifically is on a certain date and time --

20 MR. CERVANTES: Objection, argumentative. Asked and
21 answered.

22 THE COURT: Overruled, but that exact question has
23 been asked enough times.

24 MR. AMES: I think it's an important one, Your
25 Honor.

1 THE COURT: Well, it may be important, but it
2 doesn't require six repetitions. So if you have anything
3 else, ask it.

4 MR. AMES: That's all for now, Your Honor. I would
5 ask -- he might be someone I need to recall at some point.

6 THE COURT: Members of the jury, this is a good time
7 to take our lunch break. I'm not going to lecture you again.
8 Please abide by the Court's orders with respect to recesses.
9 And I'll ask you to be back here at 1:30.

10 Everyone remain seated while the jury clears the
11 floor.

12 And do leave your notes in the jury room.

13 (Jury exited the courtroom.)

14 THE COURT: You may stand down.

15 (Witness stepped down.)

16 THE COURT: Mr. Ames, do you want to discuss this
17 proposed jury instruction?

18 MR. AMES: Yes, Your Honor, just briefly.

19 We -- I believe Your Honor addressed yesterday that
20 you want --

21 THE COURT: Keep your microphone in front of you.

22 MR. AMES: I'm sorry. We wanted to discuss the
23 addition of the jury instruction. I spoke to Mr. Odulio
24 last -- he emailed me last night. We have a proposed version
25 we sent to you.

1 I just want -- I guess just noting for the record
2 that it's my understanding the Fourth Circuit does not have a
3 standard on this specifically that I can find. There's some
4 other circuits that do have a standard that we have found, a
5 total of four to my understanding, and we've noted those for
6 Your Honor. Three of them basically track what the proposed
7 instruction is, which was my -- you know, if I'm reading the
8 tea leaves, I imagine that that is -- something that is likely
9 in this case.

10 I do want to note that there is an Eighth Circuit
11 case that makes a distinction so there is a split among the
12 circuits on this issue. That case in particular, the
13 distinction that they make, Your Honor, is that if the -- in
14 order to come within the child pornography statute, there does
15 have to be an actual image of sexual abuse. Meaning that when
16 we have a situation like here where there's, you know, a head
17 of a person and a body of either an adult or it's a
18 conglomeration, or whatever, or a CGI, whatever it may be, on
19 the Eighth Circuit's version of things, it would not apply
20 because there's no actual abuse that occurred to any person,
21 and that that's where they distinguish it from the other
22 couple of circuits. Because those circuits say even if
23 there's no actual abuse, meaning it's an adult body, for
24 example, on a minor's head and nobody was used, abused,
25 coerced, nothing, it's still pornography because it depicts

1 something that appears to be abuse. That's the distinction.

2 The Fourth Circuit, as I'm aware, has never
3 addressed it. Wanted to just put that on the radar.
4 Certainly our argument would be we would argue for the one
5 that does not -- that does require actual sexual abuse. There
6 was no abuse in the images that are being put forth by the
7 government as far as the morphed stuff.

8 But understanding the Court's message yesterday
9 about preparing the instruction, that's why I jointly
10 submitted it with Mr. Odulio. I wanted to note it for the
11 record and the basics of the argument. I jointly agreed to
12 that language provided the Court wants to adopt that version
13 of the law. I would object to it just for the record,
14 preserving that in the event that it goes to the Supreme Court
15 some day and this is decided for sure.

16 THE COURT: All right. Well, we'll go with the
17 majority view and I'll accept the instruction as proposed.

18 Does this adequately address, when combined with the
19 existing instructions, the issues that will be presented to
20 the jury? For instance, a lot of those morphed images,
21 there's no question that the bodies appear to be minors. I
22 didn't really catch any that I thought, oh, well, the jury
23 might get hung up on that one. They might think that one was
24 the body of an adult. But you may argue that.

25 MR. AMES: I realized yesterday when I went home

1 that I think I was inartful. What I should have said was that
2 the images are not, I mean, I guess, explicit -- they're not
3 explicitly clearly of minor children. I'm doing a binary
4 thing, I suppose. Is it an adult or a child? I think it
5 could be ambiguous. There's a third category of maybe it's a
6 little mishmash of everything, computer-generated. Maybe it's
7 ambiguous. So that's my fault.

8 THE COURT: And if you want to argue that, that's
9 fine. That's what this instruction is meant to address. I
10 just wanted to make sure that both parties think with the
11 addition of this instruction, it will cover for the jury
12 everything they will be asked to decide. Is that where we
13 stand?

14 MR. ODULIO: Yes, Your Honor.

15 MR. AMES: I believe so, Your Honor, yes.

16 THE COURT: All right. Anything else before we take
17 our lunch break?

18 Oh, Mr. Ames, you suggested there at the end that
19 you wanted that last witness to remain available.

20 MR. AMES: Yes.

21 THE COURT: I assume you're saying to be called
22 during presentation of your evidence if you present any.

23 MR. AMES: Yes, potentially, Your Honor.
24 Potentially. And I would just respectfully request that be an
25 option. I need to look into a couple of things in case I need

1 to...

2 THE COURT: All right. Be forewarned, we're not
3 going to replot well-plowed ground.

4 MR. AMES: I understand, Your Honor.

5 THE COURT: If you have something in particular new
6 and different and relevant, I'll ask the government then to
7 keep that witness sequestered and available in the event that
8 the defense wants to call him during their case in chief.

9 MR. AMES: Thank you, Your Honor.

10 MR. CERVANTES: Your Honor, we would object to this.
11 I mean, the witness is here. He's asked his questions. We
12 don't have any redirect. And he should be excused like any
13 other witness.

14 THE COURT: Well, now, hold on. As I qualified
15 there, if there's something new -- because he's only
16 allowed -- this is honoring the breach rather than the rule.
17 Cross is only supposed to cover the areas of direct. As I
18 say, that's honored in the breach. If there's something new
19 that could not have been brought out during cross examination,
20 I'll listen to it. We may even have to get a sample of your
21 questions outside the presence of the jury because we're not
22 going to allow his recall just because you have now thought of
23 something you wished you had asked him.

24 MR. AMES: I understand.

25 THE COURT: So I know he would like to be in here,

1 but let's protect the record here and make sure he stays
2 sequestered.

3 MR. AMES: Thank you, Your Honor.

4 THE COURT: Mr. Odulio, did you want to say
5 something?

6 MR. CERVANTES: Does that mean we can't confer with
7 this witness?

8 THE COURT: No, that does not mean that because
9 there's not been any announcement that he's going to be
10 called. I'm just trying to keep him sequestered in the event
11 that he is called.

12 MR. CERVANTES: Okay.

13 THE COURT: Recess until 1:30.

14 MR. CERVANTES: Thank you, Your Honor.

15 (Lunch recess at 12:27 PM.)

16 WEDNESDAY AFTERNOON, MAY 3, 2023

17 (Court back in session at 1:28 PM.)

18 (Jury not present.)

19 THE COURT: Mr. Cervantes, did I understand you to
20 say there would be no redirect of that last witness?

21 MR. CERVANTES: Yes, Your Honor.

22 THE COURT: For everyone's planning purposes, it is
23 highly unlikely that that witness will be allowed to be
24 recalled. I won't foreclose the issue, but it's highly
25 unlikely.

M.D. - DIRECT

1 Now, is your next witness a 404(b) witness, Mr.
2 Cervantes? I'm trying to remember from what you said this
3 morning.

4 MR. ODULIO: Your Honor, the next witness is not a
5 404(b) witness.

6 THE COURT: All right. Are we ready for the jury?
7 (No response.)

8 THE COURT: Call the jury.
9 (Jury entered the courtroom.)

10 THE COURT: Please call your next witness.

11 MR. ODULIO: Your Honor, the United States calls
12 M.D..

13 M.D., GOVERNMENT WITNESS, SWORN,
14 DIRECT EXAMINATION

15 BY MR. ODULIO:

16 Q. Good afternoon, ma'am.

17 A. Good afternoon.

18 Q. Will you please state your name for the jury and spell
19 your last name for the court reporter.

20 A. Yes. It's M.D., X-X-X-X-X-X-X-X.

21 Q. Ms. M.D., where do you reside, city and state?

22 A. I live in Detroit, Michigan.

23 Q. Do you know an individual named David Tatum?

24 A. Yes.

25 Q. Do you see him in court today?

M.D. - DIRECT

1 A. Yes.

2 Q. Can you identify him by where he's seated and an article
3 of clothing.

4 A. Yeah. He's right there in looks like a blue shirt.

5 MR. ODULIO: Your Honor, if the record could reflect
6 the witness has identified the defendant.

7 THE COURT: The record so reflects.

8 Q. How do you know Dr. Tatum?

9 A. We were in a relationship.

10 Q. And approximately when was that relationship or what time
11 period?

12 A. Probably 2000 -- started in 2009 or 2010.

13 Q. And how long was it, approximately?

14 A. A year, maybe a year and a half.

15 Q. Okay.

16 A. Something.

17 Q. I'm just going to show you on your monitor what's been
18 marked for identification only --

19 A. Okay.

20 Q. -- as Government's Exhibit 4F10.

21 I'm going to ask you, Ms. M.D., do you recognize that
22 photo?

23 A. Yes.

24 Q. How do you recognize it?

25 A. That is the first day of school and that's me, my

M.D. - DIRECT

1 sibling, and my neighbors, and I shared it on Facebook.

2 MR. ODULIO: Your Honor, the government moves 4F10
3 into evidence.

4 THE COURT: It's admitted.

5 And if you would try and pin down a date for this
6 photo, please.

7 (Government's Exhibit Number 4F10 was received into
8 evidence.)

9 Q. Ms. M.D., approximate date if you recall?

10 A. Yeah, so let's see. I graduated in '01 so it would have
11 been six years before that. So 1996 maybe.

12 Q. Okay. Approximately '96.

13 Where was this photo taken?

14 A. This was taken in Hong Kong.

15 Q. And you were residing there for school at the time?

16 A. No, my dad's job. So we all lived there.

17 Q. Could you identify where you are first in the photo. And
18 I think you can just touch it --

19 A. That's me.

20 Q. -- and make a circle.

21 A. That's me.

22 Q. Okay. And approximately what grade are you in?

23 A. Either sixth or seventh grade. I'm sorry, no, either
24 seventh or eighth grade.

25 Q. And how old would you have been in that -- in either of

M.D. - DIRECT

1 those two grades?

2 A. Well, let's see. Graduated high school I was 18, right?

3 Yeah. So either 12 or 13.

4 Q. Okay. When you were identifying the picture, you
5 identified some of the other individuals. I think you said a
6 sister. Could you circle your sister.

7 (Witness complied.)

8 Q. And what is her name and approximately how old is she as
9 depicted here?

10 A. Her name is A.D.. She's 18 months younger than I am so
11 she would have been, I guess, 10. Nine or ten.

12 Q. There's another individual with a red shirt with the
13 number 18 on it.

14 A. Yes.

15 Q. Do you know who that person is?

16 A. Yes. That is our neighbor.

17 Q. And do you recall her name and about how old she was
18 here?

19 A. She was -- yes. That is L.B.. She was a grade younger
20 than me. So she would have been, like, in fifth or sixth
21 grade. So I think we said I was 12 or 13. So 11 or 12.

22 Q. And then there's a person with a striped shirt right next
23 to you on the other side.

24 A. Yes.

25 Q. Same questions.

E.H. - DIRECT

1 A. So that's S.B.. She was a grade older than me. So she
2 would have been, like, 8th or 9th grade, which would have made
3 her 13 or 14.

4 Q. Okay.

5 A. Right?

6 Q. And then finally the person to the -- with the white --
7 plain white shirt holding a cup.

8 A. Yeah. She was in probably 11th grade at the time, so she
9 would have been 17.

10 Q. And do you recall her name, ma'am?

11 A. M.B..

12 MR. ODULIO: Your Honor, no further questions.

13 THE COURT: Any cross examination?

14 MR. AMES: No, Your Honor.

15 THE COURT: All right. Thank you. You can stand
16 down.

17 (Witness stepped down.)

18 MR. ODULIO: United States calls E.H..

19 E.H., GOVERNMENT WITNESS, SWORN,

20 DIRECT EXAMINATION

21 BY MR. ODULIO:

22 Q. Good afternoon, ma'am. Could you please state your name
23 and spell your last name for the court reporter.

24 A. My name is E.H.. Last name is X-X-X-X-X.

25 Q. And tell us where you live, city and state.

E.H. - DIRECT

1 A. Fayetteville, New York.

2 Q. Do you know an individual named David Tatum?

3 A. I did, yes.

4 Q. Do you see him in court today?

5 A. Yes.

6 Q. Could you identify him, please, by where he's seated and
7 an article of clothing.

8 A. He's seated on the bench on the right with a blue shirt.

9 MR. ODULIO: Your Honor, if the record could reflect
10 the witness has identified the defendant.

11 THE COURT: The record so reflects.

12 Q. You said you knew him. What time period was that,
13 Ms. E.H.?

14 A. We dated in high school.

15 Q. Could you give us an approximate time period for when
16 that would have been.

17 A. That was my sophomore year of high school and his senior
18 year, so 2001.

19 Q. And approximately how old were you in 2001?

20 A. I was 15 at the beginning of the school year; 16 at the
21 end of the school year.

22 Q. Okay. I want to show you now what's been marked for
23 identification only as Government's Exhibit 4F2.

24 Do you see that on your screen, ma'am?

25 A. Yes.

E.H. - DIRECT

1 Q. What is that generally?

2 A. That's me and David at his senior prom -- before his
3 senior prom.

4 MR. ODULIO: Your Honor, may we publish -- move to
5 admit 4F2.

6 THE COURT: It's admitted.

7 (Government's Exhibit Number 4F2 was received into
8 evidence.)

9 MR. ODULIO: Publishing.

10 Q. You mentioned the prom. Let me just ask you this. Do
11 you know who took that picture?

12 A. No, I don't.

13 Q. And do you recall when the prom took place,
14 approximately, Ms. E.H.?

15 A. About the end of June.

16 Q. And how old are you in this picture?

17 A. I'm 16 years old.

18 Q. And I think you already mentioned there's another
19 individual in this photo. Who is that person?

20 A. It's David.

21 MR. ODULIO: Your Honor, no further questions.

22 THE COURT: Any cross examination?

23 MR. AMES: No, Your Honor.

24 THE COURT: All right. Thank you. You may stand
25 down.

M.C. - DIRECT

1 (Witness stepped down.)

2 MR. CERVANTES: The United States calls M.C.

3 M.C., GOVERNMENT WITNESS, SWORN,

4 DIRECT EXAMINATION

5 BY MR. CERVANTES:

6 Q. Good afternoon.

7 A. Hello.

8 Q. Can you please tell the jury your name and spell your
9 last name for the record.

10 A. My name is M.C. XXXXXXXX is spelled X-X-X-X-X-X-X.

11 Q. And where do you live, city and state?

12 A. I live in Seattle, Washington.

13 Q. Do you know David Tatum?

14 A. I do.

15 Q. What's your connection to him?

16 A. We're cousins not by blood. His grandfather married my
17 grandmother.

18 Q. Do you see David in the courtroom today?

19 A. Yes.

20 Q. Can you describe an article of clothing that he's
21 wearing.

22 A. Blue shirt, black tie.

23 MR. CERVANTES: Your Honor, may the record reflect
24 the witness has identified the defendant.

25 THE COURT: The record so reflects.

M.C. - DIRECT

1 Q. I'd like to show you something on the screen. It's
2 already been admitted as Government's Exhibit 1D. I'm going
3 to play the first two seconds.

4 (Government's Exhibit Number 1D was published.)

5 Q. Do you recognize that video?

6 A. Yes.

7 Q. How do you recognize it?

8 A. It has been brought to my attention by the prosecution.

9 Q. Have you seen that video in its entirety?

10 A. Yes, I have.

11 Q. Do you recognize that person depicted in the video?

12 A. Yes. That's me.

13 Q. Okay. Do you know more or less how old you were in that
14 video?

15 A. Yeah, I was approximately -- I was either 14 or 15 in
16 that video.

17 Q. How much older is David than you?

18 A. He was either 17 or 18 when I was born.

19 Q. Okay. So 17 or 18 years older than you?

20 A. Correct.

21 Q. Do you recognize the background in that video?

22 A. Yes, I do.

23 Q. What is that?

24 A. That is the bathroom in my family's cabin in Maine.

25 Q. Who used that bathroom?

M.C. - DIRECT

1 A. Everyone. There's two bathrooms in the house. Sometimes
2 there would be 20 people coming to our family reunion, so most
3 people would use that bathroom.

4 Q. Did you -- did you know that this recording -- these
5 images were being made of you?

6 A. Absolutely not.

7 Q. Did you -- when you had these family trips, did you see
8 David there?

9 A. Yes. He was there almost every year.

10 Q. I'd like to show you what has been marked for
11 identification as Government's Exhibit 1D1.

12 Do you recognize this image?

13 A. Yes.

14 Q. Is this a screenshot from the video we just saw?

15 A. Yes.

16 MR. CERVANTES: Government moves 1D1 into evidence.

17 THE COURT: It's admitted.

18 (Government's Exhibit Number 1D1 was received into
19 evidence.)

20 Q. Who is that in this screenshot?

21 A. That's David Tatum.

22 Q. How do you recognize him?

23 A. I've known him since I was born so I recognize his face.

24 Q. Is there anything about the clothing that you recognize?

25 A. Yeah, I recognize the jacket. It was something he would

E.S. - DIRECT

1 wear often at the cabin.

2 MR. CERVANTES: No further questions, Your Honor.

3 THE COURT: Any cross examination?

4 MR. AMES: No, Your Honor.

5 THE COURT: Thank you. You may stand down.

6 THE WITNESS: Thank you.

7 (Witness stepped down.)

8 MR. ODULIO: The government calls E.S..

9 Your Honor, a portion of this testimony is 404, the
10 latter part of it.

11 THE COURT: All right. Just let me know when we get
12 to that point.

13 MR. ODULIO: Yes, sir.

14 E.S., GOVERNMENT WITNESS, SWORN,

15 DIRECT EXAMINATION

16 BY MR. ODULIO:

17 Q. Good afternoon, ma'am.

18 A. Good afternoon.

19 Q. Could you please state your name and spell your last name
20 for the court reporter.

21 A. E.S., X-X-X-X-X.

22 Q. Ms. E.S., where do you reside, city and state?

23 A. Louisville, Kentucky.

24 Q. Do you know an individual named David Tatum?

25 A. I do.

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1 Q. How do you know him?

2 A. We are cousins.

3 Q. Do you see him in court today?

4 A. I do.

5 Q. Would you please identify -- or could you please say an
6 article of his clothing and identify where he's seated.

7 A. Bright blue shirt, black jacket.

8 MR. ODULIO: Your Honor, if the record could reflect
9 that the witness has identified the defendant.

10 THE COURT: The record so reflects.

11 Q. I'm going to show you, Ms. E.S., a portion of
12 Government's Exhibit 1G which is in evidence. And this is the
13 7-minute mark of Government's Exhibit 1G.

14 (Government's Exhibit Number 1G was published.)

15 Q. Do you see that on your screen, ma'am?

16 A. I do.

17 Q. We'll take it off.

18 I'm going to ask you if you recognize the person in that
19 video.

20 A. I do.

21 Q. Who is it?

22 A. That is my cousin K.C..

23 Q. And do you recognize the room this is in?

24 A. Yes. That is the bathroom in our cabin in Maine.

25 Q. Have you been there?

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1 A. Yes.

2 Q. How many times have you been there?

3 A. Oh, probably over 30. I've been going pretty much every
4 summer since 1993.

5 Q. You mentioned that it's in Maine. Approximately where in
6 Maine is that?

7 A. Bethel, Maine.

8 Q. When you've gone has the defendant, David Tatum, been
9 there?

10 A. Yes.

11 Q. I'm going to show you now what's been marked and admitted
12 as Government's Exhibit 1D1.

13 Do you see 1D1, ma'am, which has been admitted into
14 evidence, on your screen?

15 A. Yes.

16 Q. Who is the person on the screen?

17 A. David Tatum.

18 Q. The room that's in, is that the same room --

19 A. It is.

20 Q. -- that we saw in Government's Exhibit 1G?

21 A. Yes.

22 Q. And how do you know that?

23 A. That is the upstairs bathroom in the cabin. The way I
24 can tell is because of the curtains, the way that the shower
25 is set up, and there is a toilet behind him which you can see

E.S. - DIRECT

1 there is an aerosol can that would be resting on top of the
2 toilet. That is absolutely the upstairs bathroom at our
3 family cabin in Maine.

4 MR. ODULIO: Okay. We'll take that down.

5 Your Honor, I'm going to get into it now.

6 THE COURT: All right. Members of the jury, this
7 issue came up yesterday. You're about to hear some evidence
8 of a prior bad acts allegedly by the defendant, conduct for
9 which he has not been charged. However, the law allows this
10 kind of evidence for certain limited purposes. For example,
11 this evidence may be considered by you to prove the
12 defendant's motive, opportunity, intent, preparation, plan,
13 knowledge, identity, or absence of mistake or accident. Keep
14 in mind the limited purpose for which this evidence is
15 admitted. Most importantly, do not conclude from this
16 evidence that the defendant has bad character in general, nor
17 should you conclude because the defendant may have committed
18 the bad conduct in the past, that he is more likely to have
19 committed the crimes with which he is currently charged.

20 You may proceed.

21 MR. ODULIO: Thank you, Your Honor.

22 BY MR. ODULIO:

23 Q. Ms. E.S., have you ever talked to Dr. Tatum about any
24 surreptitious bathroom recordings of you?

25 A. Yes, I have.

E.S. - DIRECT

1 Q. When did that conversation take place?

2 A. It was around Christmas of 2002.

3 Q. Where did that conversation take place?

4 A. It was at our -- my great aunt's home in Atlanta,
5 Georgia. We used to meet there opposite of when we would meet
6 at the cabin. We'd meet at the cabin in the summer and we'd
7 meet in Georgia in the winter.

8 Q. What did you tell Dr. Tatum about the surreptitious
9 video?

10 A. I confronted him. I told him that his sister had found a
11 video of she and I and I wanted more information about it.
12 Wanted to know why he had done it.

13 Q. Okay. So you confronted him about a surreptitious
14 bathroom recording of you and the defendant's sister.

15 A. Yes.

16 Q. How old were you in these videos?

17 MR. AMES: Your Honor -- with respect, Your Honor,
18 I'm going to object to foundation for this. My understanding
19 it's hearsay. It's based upon --

20 THE COURT: We've been over this. Overruled.

21 MR. AMES: Thank you, Your Honor.

22 THE COURT: You may answer.

23 THE WITNESS: I'm sorry, can you ask the question
24 again.

25 Q. Yes. Just listen to my question carefully.

E.S. - DIRECT

1 In this conversation you had with the defendant and
2 referencing this video, how old were you in this video?

3 A. Fifteen or 16.

4 Q. And you referenced the defendant's sister.

5 A. Yes.

6 Q. Is the defendant's sister older or younger than you?

7 A. She is younger than I am.

8 Q. By how much?

9 A. By two years.

10 Q. As a result of this confrontation, did the defendant say
11 anything to you?

12 A. Yes.

13 Q. Tell the jury what he said.

14 A. He admitted immediately to taking the video. He told me
15 it was a mistake and he told me he would never do it again.

16 Q. Did he show you how he did it?

17 A. He did.

18 Q. What did he show you?

19 A. He showed me in the upstairs bathroom in this home how he
20 was able to take the video. There is a plastic fan register
21 on the wall that was not bolted in and so you could slide the
22 register to the side exposing a raw edge of drywall and you
23 can see through to a crawl space. There are crawl spaces all
24 throughout this home in Atlanta. And from that crawl space
25 you can look through the crack and see the entire bathroom.

F.L. - DIRECT

1 MR. ODULIO: Your Honor, nothing further.

2 THE COURT: Any cross examination?

3 MR. AMES: One moment, Your Honor.

4 (Counsel and defendant conferred.)

5 CROSS EXAMINATION

6 BY MR. AMES:

7 Q. I have just one question. How far apart in age are you
8 and Mr. Tatum, do you know?

9 A. He's November '82. I'm XXXX of '84.

10 Q. November '82, and you said...

11 A. XXXX of '84.

12 Q. XXXX of '84. Okay.

13 MR. AMES: No further questions, Your Honor.

14 THE COURT: Redirect?

15 MR. ODULIO: Nothing, Your Honor. May she be
16 excused?

17 THE COURT: She may. Thank you.

18 (Witness stepped down.)

19 MR. CERVANTES: The United States calls F.L..

20 F.L., GOVERNMENT WITNESS, SWORN,

21 MR. CERVANTES: Your Honor, may we have the
22 instruction?

23 THE COURT: Yes.

24 Members of the jury, again, I'm led to believe that
25 this witness will be testifying about uncharged conduct,

F.L. - DIRECT

1 prior -- or other bad acts. And so the same considerations
2 apply to this witness's testimony that I just instructed you a
3 few minutes ago.

4 DIRECT EXAMINATION

5 BY MR. CERVANTES:

6 Q. Good afternoon.

7 A. Hello.

8 Q. Will you please tell the jury your name and spell your
9 last name, please.

10 A. Hello. My name is F.. My last name is L., X-X-X-X-X.

11 Q. Can you tell them where you live, city and state.

12 A. Absolutely. I live at XX XXXXX XXX Webster, New York.

13 Q. No, no, I'm sorry.

14 MR. CERVANTES: Your Honor, may the record strike
15 the actual address.

16 THE COURT: Yes, please.

17 THE WITNESS: I'm sorry.

18 Q. That's okay. Just the city.

19 A. I live in Rochester, New York.

20 Q. Okay. Great.

21 Do you know David Tatum?

22 A. I do.

23 Q. How do you know him?

24 A. I met him through the hospital at inpatient, like
25 inpatient when I was in high school.

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1 Q. And do you see him here in the courtroom today?

2 A. I do.

3 Q. Okay. Can you describe the color of shirt that he's
4 wearing.

5 A. It's like a cyan blue.

6 MR. CERVANTES: Your Honor, may the record reflect
7 the witness has identified the defendant.

8 THE COURT: The record so reflects.

9 Q. You said you were in high school when you first met him?

10 A. Yes.

11 Q. Do you recall more or less how old you were?

12 A. I was definitely under 18. I would say junior or senior
13 in high school.

14 Q. And had you been seeing him as a patient for some time?

15 A. Correct.

16 Q. And when is your birthday?

17 A. My birthday is XXXX XX, 1997.

18 Q. I'm going to show you a video that has already been
19 admitted in evidence as 1I, and I'm going to play you the
20 first ten seconds and then I'm going to stop and ask you some
21 questions, okay?

22 A. Sure thing.

23 (Government's Exhibit Number 1I was published.)

24 Q. I'm sorry, I'm going to let it play until you can hear
25 the other voice in the video, okay?

F.L. - DIRECT

1 A. Okay.

2 (Government's Exhibit Number 1I resumed.)

3 Q. Okay. Have you seen the entirety of this video?

4 A. I have.

5 Q. And have you seen another two video recordings of you?

6 A. I have.

7 Q. And have you heard the audio to these recordings?

8 A. Yes, I have.

9 Q. Do you recognize who it is -- first let's talk about the
10 female that the image is directed to. Do you recognize that
11 person?

12 A. Yes. The female in the video I recognize as myself as
13 well as the voice.

14 Q. How do you recognize yourself?

15 A. Well, I can recall the clothing I was wearing. I can
16 tell you where each item was from.

17 Q. From where?

18 A. Well, the dress was from Pac Sun and the pink cardigan
19 was from Old Navy. The brown and army green flip-flops were
20 also from Pac Sun. And I still have the silver anklet.

21 Q. Okay. You said you recognized the voice as well. Who is
22 that?

23 A. The female voice in the video was myself.

24 Q. And did you -- were you able to recognize the male voice
25 in the video?

F.L. - DIRECT

1 A. Yes, I can recall that voice as Mr. -- Dr. Tatum.

2 Q. Did you know that these recordings were being made of
3 you?

4 A. I did not.

5 MR. CERVANTES: No further questions, Your Honor.

6 THE COURT: Any cross examination?

7 MR. AMES: No, Your Honor.

8 THE COURT: All right. Thank you. You may stand
9 down.

10 THE WITNESS: Thank you.

11 (Witness stepped down.)

12 MR. CERVANTES: May we have a minute to confer, Your
13 Honor?

14 THE COURT: You may.

15 (Counsel conferred.)

16 MR. CERVANTES: At this time the government rests
17 its case.

18 THE COURT: Members of the jury, at this point in
19 the trial there's several scheduling and legal issues that I
20 have to take up with the attorneys. So even though we've only
21 been here half an hour, I'm going to ask you to go back to the
22 jury room and give us a few minutes to do that and we'll get
23 back to you as soon as we can. I'm sure you recall all the
24 rules.

25 (Jury exited the courtroom.)

1 THE COURT: Mr. Ames.

2 MR. AMES: Yes, Your Honor.

3 THE COURT: I assume you have a motion you want to
4 make.

5 MR. AMES: Yes, a motion to dismiss at the close of
6 state's evidence, Your Honor.

7 Just briefly, a general -- a general concern about
8 the foundation as I've had a standing motion throughout the
9 trial, Your Honor. The reliability, chain of custody in
10 particular on some evidence as well.

11 We have a situation here where there is very little
12 information about the origin, attribution of the devices
13 themselves. The essential evidence that was presented as to
14 their authenticity was that an investigation was conducted and
15 followed up on at a lawyer's office with the defendant's wife
16 and that the device turned over ostensibly by her is the
17 purported device here. That's really seemingly the
18 foundation. As for the documents inside and chain of custody
19 not necessarily with law enforcement but prior to that, where
20 these devices came from, whether they had sufficient authority
21 to seize the devices, and so on and so forth.

22 And then from there, additional concerns about the
23 chain of custody within the FBI and within the government with
24 respect to certain devices. There are multiple agents in this
25 case. Only one of them testified. There are -- the

1 testimony, in essence, for many of these devices was it was
2 seized in a meeting with Agent Brown present. She was there.
3 Taken presumably into custody. Copied by Mr. Whitt. But in
4 particular with this hard drive, it was sent off to Quantico;
5 received back from Quantico. Mr. Whitt took it out of
6 evidence when he did his analysis on this copy.

7 But chain of custody as to the in-between I don't
8 believe has been established. I don't believe that and other
9 devices have had testimony about who logged them in and where
10 and who requested they be sent out. I believe the agent who
11 sent out this device to be copied and that we have the
12 testimony about from Quantico never testified about anything,
13 nor any other of the foundation for any of the images or
14 items. And while we heard from one expert on the copying
15 process, what we don't have is the in-between.

16 With respect to the evidence itself, there are, I
17 think, certainly images that have been seen that do not, as a
18 matter of law, constitute child pornography. I'm not sure if
19 the government is specifically alleging any -- or arguing any
20 specific one of the shots that we've seen on here. I know
21 certainly the one, my understanding, that constitutes the
22 production charge would be the one with Ms. M.C. in the
23 shower. I believe as far as transport and possession, that
24 one also constitutes the basic premise as well. And the
25 remaining generally for possession, but I'm not entirely sure

1 about that. I believe that's generally accurate. Perhaps the
2 HP Pavilion also transport, I don't know.

3 But what I will say is that certainly there are
4 images that the Court has seen, the jury has seen that has
5 been acknowledged even here that are just, you know, waist up
6 or do not show genitalia whatsoever that I think -- I would
7 argue as a matter of law are not pornography. I think that
8 other images fall in that same camp. As the analyst testified
9 to, he marked -- he marked in his analysis one himself, but
10 not the rest. And then it was shipped off to the agents to
11 give their take on what would be presented. We haven't heard
12 from them. We heard from the first one, Marisa Brown, prior
13 to the evidence being in court.

14 THE COURT: Well, we really don't need a witness's
15 opinion as to whether something is child pornography. That's
16 a question for the jury.

17 MR. AMES: Understood, Your Honor. I'm just saying
18 if -- I guess sort of what I'm getting at in part is I
19 understand that these are fact finding questions for the jury
20 with respect to the shower video and some of the other images.
21 I do understand. There are other images that very clearly are
22 not.

23 So one thing I do, in addition to the motion to
24 dismiss, if there's any -- when the time comes for instructing
25 the jury, avoiding any potential confusion with respect to

1 what image constitutes what just because there's a -- this
2 morphed image sort of production -- producing making an image
3 sounds similar to the producing statute, which it's not. It's
4 a different -- the only production charge is with Ms. M.C. in
5 the shower. That's the only one. The rest of them are
6 something else. And I just want to make sure that it can be
7 clarified, whether it has to be done in argument or the Court,
8 that that's -- that count in particular, that's the production
9 charge. The other ones are not. Because I don't want a
10 situation where the jury is reviewing morphed images and
11 mistakenly come to the conclusion that those are production
12 images.

13 THE COURT: That might have been something that you
14 would have proposed in the jointly submitted jury
15 instructions.

16 MR. AMES: Your Honor, we did speak about it prior
17 to trial and the -- we came to a meeting of the minds that it
18 generally lays it out, but I suppose what I'm -- I suppose
19 what I'm currently wondering is that are there any
20 restrictions on it in terms of -- because I understand -- I'm
21 not going to argue about length of sentence or anything like
22 that, but how to address that with the jury so as to not run
23 afoul of anything there, but needing to make it abundantly
24 clear that there's only one image -- or one video, rather,
25 that is considered production.

1 THE COURT: That's correct, right, Mr. Cervantes,
2 that the one, the bathroom number one is the --

3 MR. CERVANTES: Is the production charge.

4 THE COURT: -- only evidence supporting count one,
5 production, correct?

6 MR. CERVANTES: Count two.

7 THE COURT: Count two, I'm sorry.

8 And I'm wide open to yet more changes to the
9 previously agreed to jury instructions. We're going to need
10 to get it in writing because I send those back with the jury.
11 I don't mind telling them that the allegation with respect to
12 count two is the bathroom number one production and no other.
13 I'm willing to say that. We'll just have to get that in
14 writing to Mr. Whelan somehow.

15 But with respect to the rest of your motions, I
16 think the chain of custody is sufficient from which the jury
17 could find that the items are reliable and relevant. And, you
18 know, to a certain extent I'm not sure you and I understand
19 the evidence the same way. These devices could have been
20 found on the sidewalk for all that matters. The evidence
21 tying it to the defendant is the forensic evidence. And so
22 there's been much ado over something that I think doesn't
23 matter particularly much, which is how the FBI came into
24 possession of it and its custody afterwards.

25 So all that to say that there is sufficient evidence

1 from which a reasonable jury could find beyond a reasonable
2 doubt the defendant's guilt as to each of the three counts.

3 Now, will there be defense evidence, Mr. Ames?

4 MR. AMES: Your Honor, that's some -- we're having
5 that conversation because we weren't anticipating that.
6 However, the way the testimony has played out and the evidence
7 has played out, without the lead analyst -- lead detective or
8 investigator in the case testifying, nor another agent
9 testifying prior to the evidence coming in, cross examination
10 of Mr. Whitt who did not investigate the devices, anything
11 deeper than looking for images themselves that were flagged or
12 requested in a report of him, we're in a position where the
13 government's evidence has certainly at a minimum implied
14 certain things.

15 The reason, Your Honor, why I spent so much time
16 hemming and hawing over the idea of what constitutes access is
17 because prior to me doing so, the jury may very well have come
18 to the conclusion that access means literal access. That he
19 accessed these on these dates and times. And it's -- he's
20 looking at certain videos like this one of Ms. M.C. who has an
21 access date of September 10, 2021, 12 days before the FBI
22 meets with him. When in reality there is no idea whatsoever
23 when or if this thing was ever accessed on a MacBook for sure.
24 Unclear as well on any other device. So those issues are why
25 I was asking those questions. And there's further --

1 THE COURT: My question was, is there going to be
2 defense evidence?

3 MR. AMES: Yes, there is, Your Honor. I believe we
4 have to. And I think we would call Agent Atwood.

5 THE COURT: To what effect?

6 MR. AMES: Under Rule 611(c) to ask questions about
7 the custody and chain of custody of devices. To ask about
8 what, if any, investigation he did in his review of the
9 evidence. We're talking here about a trial in which there was
10 one person put on the stand to talk about the review of the
11 evidence and the only review of the evidence that was
12 instructed to apparently and flagged by agents who didn't talk
13 about it.

14 THE COURT: That happens all the time. I don't
15 understand what the grave concern is here.

16 MR. AMES: Because, Your Honor, these --

17 THE COURT: Because it is common, it is ordinary, it
18 is the norm that not every case agent testifies in every trial
19 to everything they know.

20 MR. AMES: And, Your Honor, I can -- in that case --
21 the alternative -- our -- who's been a consulting expert but
22 now may have to graduate because the devices that were seized
23 here have copious adult pornography on them that was glossed
24 over. And I asked those questions, but there was no -- there
25 were no answers to them because the people that actually

1 reviewed it -- so the context here is important.

2 THE COURT: So you want to put one of the case
3 agents up on the stand to ask them whether there was adult
4 pornography on some of these devices?

5 MR. AMES: In addition -- there's other -- there's
6 other aspects, Your Honor. But in general, the problem I'm
7 facing here is that a lot of the people that were very
8 integral into this process are not here to answer and clear up
9 very simple issues.

10 For example, you found and the government is
11 alleging a total of -- the morphed stuff aside, there's four
12 videos total of which no one is identified in any of them but
13 the Ms. M.C. video. Most of the other -- I mean, very little
14 identification of anybody. No identification of any known
15 victim --

16 THE COURT: There were three videos --

17 MR. AMES: -- other than --

18 THE COURT: There were three videos and at least one
19 witness identified the person in each of those videos.

20 MR. AMES: Your Honor, I'm talking about the ones
21 that are pornography, not 404. I'm talking about -- videos
22 that would be alleging pornographic material are going to be
23 Ms. Connell's video and I presume -- I don't know for sure.
24 Maybe they're not arguing that. But there are two or three
25 other videos that involved more sexualized activity whose

1 identity -- there's no identity of those people.

2 THE COURT: So you're saying that there's some sort
3 of deficiency. Are you talking about, like, the two young
4 girls that were in the bed together that no one has identified
5 who they are?

6 MR. AMES: No, nobody has identified who --

7 THE COURT: Who cares?

8 MR. AMES: Because, Your Honor, there's a process by
9 which they check these. And these videos in particular, Your
10 Honor, were found on an older device. It's a device from
11 years ago.

12 THE COURT: No, wait, wait, wait. The jury can look
13 at that video and decide from what they see whether that fits
14 the definition of child pornography.

15 MR. AMES: Sure.

16 THE COURT: It doesn't matter whether that video can
17 be found in any database as a known example of child
18 pornography. It doesn't make any difference.

19 MR. AMES: With respect, I would submit it does,
20 Your Honor, because if it is found and flagged in a -- if it's
21 flagged I'm assuming it's inculpatory. If it's not, I'm
22 arguing that's exculpatory.

23 THE COURT: How so? That somebody hasn't already
24 seen that picture and deemed it to be child pornography and
25 therefore the jury cannot deem it to be child pornography or

1 shouldn't consider child pornography because someone else
2 already hasn't?

3 MR. AMES: Your Honor, part of the reason is I --
4 we're talking about a case here where 20-plus devices were
5 seized and searched. A number of images. Paved through.
6 Sent to NCMEC; came back with zero.

7 THE COURT: It doesn't make any difference. It
8 doesn't make any difference whether we are seeing a child porn
9 video for the first time or not. The question for the jury
10 is, is it child porn and is it attributable to this defendant?
11 Oversimplification, of course. It doesn't matter whether any
12 other trial anywhere has ever seen that video. It doesn't
13 make any difference. It's not exculpatory if it hasn't shown
14 up somewhere else.

15 One way to have elicited it would have taken less
16 than 30 minutes. From the agent you had up here is to ask:
17 Are there databases to which the FBI has access of known hash
18 tag child porn? Yes. Did you run the seized videos through
19 that database? Yes. Did it hit on any of those? No.

20 That's about 60 seconds, not 30 minutes, and you
21 could have elicited the testimony that you now say is just so
22 desperately relevant and I'm telling you it's not relevant.

23 MR. AMES: Your Honor, I did -- I asked specifically
24 about whether or not it was sent to any -- I asked
25 specifically the database that the government used in this

1 case and I was not allowed to ask about it.

2 THE COURT: All right. Mr. Ames, we're talking past
3 each other. I'm telling you it is not relevant. The Court
4 finds it is not relevant and there is no admissible evidence
5 with respect to whether or not the videos in question here are
6 in known -- in databases of known child pornography. It makes
7 no difference. It either is or is not child pornography, as
8 the jury will tell us.

9 MR. AMES: Understood, Your Honor. And in a future
10 case, if there is government evidence of not just NCMEC -- I
11 imagine I will be certainly filing matters to make sure that
12 that's not disclosed. But there certainly is, in addition,
13 Your Honor, forensic information that is being -- that is --
14 you know, he has the right to confront accusers. He has the
15 right to give the jury a fuller picture and full story. I've
16 already instructed and told --

17 THE COURT: I keep asking you what that story is
18 you're trying to tell.

19 MR. AMES: Your Honor, because the government's
20 evidence as presented was that there are images and videos
21 that were accessed by him and playlists and PLISTS and things
22 accessed by him -- and we're talking largely about 404
23 evidence, not even substantive evidence. We're talking about
24 the extraneous stuff. They supposedly investigated -- or
25 supposedly accessed and viewed and seen by him and on things

1 and so on, and there's zero mention of the fact that there's
2 literally another person in the house that literally uses that
3 device as well and literally was spying on him and gathering
4 information, and she was giving that information directly to
5 Agent Atwood on multiple occasions --

6 THE COURT: You can't get that in through Agent
7 Atwood.

8 MR. AMES: I understand, Your Honor, but that's --

9 THE COURT: Do you want to call his ex-wife as a
10 witness? Is that what you're saying?

11 MR. AMES: That's not what I want to do, Your Honor.
12 I want it to be at least established here that the devices in
13 question, particularly the MacBook, was a thing that they
14 shared together and she accessed on a routine basis which --

15 THE COURT: The agent doesn't know that except from
16 having been told that.

17 MR. AMES: The agent knows it because there were
18 pictures that she took of the screen of the device on multiple
19 occasions and they know she accessed it on multiple occasions
20 and took copies of all of those things.

21 THE COURT: How does he know that other than
22 hearsay?

23 MR. AMES: He's seen the images himself of the
24 computer screen.

25 THE COURT: And what does he know of those images?

1 MR. AMES: Your Honor, then I'd like to renew my --

2 THE COURT: He knows what the ex-wife told him
3 about --

4 MR. AMES: Your Honor, then I'll -- in that light
5 I'll renew my motion to suppress from earlier, then, because
6 if he --

7 THE COURT: That's denied too.

8 Let me address Mr. Tatum about whether or not you
9 wish to testify. If you would stand up, please, sir.

10 Mr. Tatum, you have a constitutional right not to
11 testify. The burden of proof is on the government to prove
12 the elements of the offense beyond a reasonable doubt and you
13 are presumed innocent.

14 Do you understand that you have a constitutional
15 right not to testify?

16 THE DEFENDANT: Yes, Your Honor, I understand.

17 THE COURT: You also have a right to testify if you
18 would like to. Do you understand that?

19 THE DEFENDANT: Yes, I also understand that, Your
20 Honor.

21 THE COURT: And if you choose to testify, you'll be
22 subject to cross examination by the assistant United States
23 attorney. Do you understand that?

24 THE DEFENDANT: Yes, Your Honor.

25 THE COURT: And do you understand that it is your

1 decision and your decision alone whether or not to testify?

2 THE DEFENDANT: Yes, I understand.

3 THE COURT: And I don't want to know what you and
4 your attorney said to each other on the subject, but have you
5 discussed with your attorney whether or not you will testify?

6 THE DEFENDANT: We have discussed it. We have not
7 come to a decision.

8 THE COURT: All right. And the -- are you satisfied
9 with your attorney's advice with respect to this, whatever it
10 is? I don't want to know what it is, but are you satisfied
11 with his advice?

12 THE DEFENDANT: Under current circumstances, yes.

13 THE COURT: Is there anything that you don't
14 understand about your right to testify or not testify?

15 THE DEFENDANT: No, Your Honor, I understand my
16 rights.

17 THE COURT: And you said you haven't made a
18 decision, but it's decision time. It's now time for defense
19 evidence if there's going to be any, so the Court needs a
20 decision as to whether or not you're going to testify.

21 THE DEFENDANT: Yes, I'd like to discuss this
22 further with my attorney.

23 THE COURT: All right. Is one of the attorney rooms
24 available? I don't want to drag this out. I know you need
25 some time, but we've got a jury sitting out there wondering

1 what we're going to do.

2 MR. AMES: I understand. Your Honor, we spoke about
3 it last evening as well and --

4 THE COURT: Well, retire to your conference room for
5 further discussion.

6 (Counsel and defendant exited the courtroom.)

7 (Pause.)

8 THE COURT: Officer, would you ask Mr. Ames to come
9 give me an update.

10 (Counsel and defendant entered the courtroom.)

11 THE COURT: Mr. Tatum, have you made a decision
12 whether or not to testify?

13 THE DEFENDANT: I'd like the Court to consider
14 something else before I answer.

15 THE COURT: What would that be?

16 MR. AMES: Your Honor, the defense has been
17 consulting with a forensic team, as the Court knows. We did
18 not anticipate calling him for trial. Did not ever think that
19 that would be something we were needing. They were consulting
20 with us throughout the process. We spoke over the lunch break
21 briefly with one of the analysts and I gave him an update on
22 some things. Texted with him.

23 And in light of some of the things that I think the
24 Court needs to -- that the jury needs to hear about with
25 regard to some of the forensic evidence that's not been able

1 to be established here, we would like to see if our expert
2 witness can come testify about those things in the case in
3 chief. He is unfortunately farther away but could be here
4 tomorrow morning. That's the issue that we're facing. I can
5 elaborate further if the Court wishes.

6 THE COURT: What reciprocal discovery have you
7 provided to the government with respect to this witness?

8 MR. AMES: Your Honor, there hasn't been any
9 reciprocal discovery in terms of any reports or notes or
10 anything of that nature. They have been on a consulting
11 fashion. I can tell the Court that the only evidence that the
12 analyst has looked at are copies of data provided by the
13 government. That's the extent of it. It's literally the raw
14 data, the same stuff that Mr. Whitt looked through with Magnet
15 AXIOM. And it would largely be testimony about some of the
16 dates, time frames, accesses, and so on and so forth, on the
17 device that we were not -- that some of those issues have not
18 largely been clarified and established. And that is the
19 primary driving point for me.

20 And my position is that there are some important
21 timelines that need to be addressed that have not been that
22 give an impression of the evidence that I don't think is fair
23 to Mr. Tatum. So it's largely in that vein. I don't know if
24 that counts as a rebuttal of sorts. I don't know, Your Honor,
25 but there --

1 THE COURT: Mr. Cervantes, what do you say?

2 MR. CERVANTES: We would object to that, Your Honor.
3 The jury is here. We've been moving forward as scheduled on
4 this trial. We have received zero information from them. The
5 fact that they went with their expert, we don't sit there with
6 their expert to look at what they're looking at. That's why
7 there's a request for reciprocal discovery, which we made and
8 we filed. And we told defense counsel numerous times in
9 emails that -- we reminded him, hey, we haven't received
10 anything from you. Do you have any discovery for us? Do you
11 have any expert reports for us? And the answer was either no
12 answer or no.

13 THE COURT: And did the government provide an expert
14 report from its expert forensic witness?

15 MR. CERVANTES: Yes, Your Honor. Detailed.

16 MR. AMES: Your Honor --

17 MR. CERVANTES: And filed expert notices as required
18 by the rules.

19 MR. AMES: Your Honor, I spoke with the U.S.
20 Attorney's Office -- and, again, he's right -- on multiple
21 occasions both in person and by email. We had those
22 discussions. I informed them throughout the pendency of this,
23 and I guess it's been since -- I guess since January or so,
24 that the intention here was -- the problem in this case,
25 there's a significant amount of devices and a significant

1 amount of data and a lot of it -- again, part of the reason
2 why I'm objecting to the foundation and hearsay, Your Honor,
3 is there are significant and important elements of these
4 crimes that are related to times and dates. And the evidence
5 that the jury is considering is produced by a computer sitting
6 on a screenshot that was taken at some point in the past by, I
7 guess, Mr. Whitt and that is being claimed as a basis to
8 establish when and where things were made from -- created,
9 accessed, viewed, and so on. And there's evidence to the
10 contrary that is sitting on the devices that Agent -- I
11 understand he didn't look through it, that's okay, but it's
12 out there now.

13 THE COURT: You clearly anticipated that that's
14 evidence you wanted to put before the jury.

15 MR. AMES: It is -- no, Your Honor, it is not. I
16 did not anticipate, Your Honor -- first of all, the
17 government's estimate was a 3-day trial. That's it. So
18 that's -- the expectation here was not that we would be at
19 this juncture today.

20 Number two, it's not something I anticipated. I did
21 not anticipate that we're going to call the lead agent in the
22 case nor the other agent in the case and have them say nothing
23 about any of the evidence itself. Zero testimony about it.
24 The entirety of it is with Mr. Whitt which -- his contribution
25 is great. But it also includes him reviewing evidence that

1 was flagged by them, vice versa. There's a lot that wasn't
2 discussed and there's a lot that I would say needs to be
3 clarified and we can't clarify. How am I supposed to clarify
4 that multiple people use this computer because that's what
5 the --

6 THE COURT: You know exactly who the witnesses are
7 who could have provided that information. Specifically, even
8 if your client doesn't want to testify, his ex-wife. You
9 could have subpoenaed her. She could prove exactly what
10 you're trying to prove. You've chosen not to do that.

11 I'm not sure how your technical expert is going to
12 be able to say anything more than I see these other user names
13 on these things. He doesn't know as a fact who else had
14 access to those computers, right?

15 MR. AMES: I'm not going to say yes or no to that,
16 Your Honor. I don't want to -- I don't know for sure whether
17 it's a fact.

18 THE COURT: All right. We're going to do this.
19 First of all, with respect to Agent Atwood, I'm not telling
20 you you can't call Agent Atwood. I am saying you're not going
21 to be allowed to have him answer hearsay questions.

22 MR. AMES: I understand.

23 THE COURT: And I didn't hear a forecast of much by
24 way of hope for examination that wasn't hearsay. But if you
25 want to call him and ask him questions, I'm not going to stop

1 you from doing that. But he's not going to answer any hearsay
2 question.

3 MR. AMES: Your Honor, the main thrust of this is
4 that the government has presented evidence to suggest, yeah,
5 this is a case that has a limited number of images and videos.
6 It's got a lot of 404 evidence. It's got a lot of conjecture
7 about -- it's got file paths and strings about pthc. And how
8 much pthc was found? Goose egg. Zero. So it's to inflame
9 the jury. It's to suggest certain things to them with zero
10 evidence, zero things to -- nothing to back it up.

11 THE COURT: Save your closing argument for the
12 appropriate time.

13 MR. AMES: And, Your Honor --

14 THE COURT: All right. I'm going to take a
15 20-minute recess and I'm going to think about this request.

16 MR. AMES: Thank you, Your Honor.

17 THE COURT: Ms. Kirk, if you would tell the jury
18 that we've been delayed and I expect to have them out here at
19 about 3:00.

20 By that time you will make a decision to call Agent
21 Atwood and I will have made a decision whether to allow this
22 undisclosed expert witness.

23 We'll be in recess until 3:00.

24 (Brief recess at 2:42 PM.)

25 (Court back in session at 2:58 PM.)

1 (Jury not present.)

2 THE COURT: The Court in the exercise of its
3 discretion will not allow the defense to call an undisclosed
4 expert, particularly with the lack of reciprocal discovery.
5 It would be an ambush and unfair to the government. I
6 certainly wouldn't allow the government to call an undisclosed
7 expert with no report provided.

8 It's been clear from at least the pretrial
9 conference that there are a great many things that you were
10 hoping to be able to put in front of the jury and you were
11 hoping to do that through government witnesses, but the
12 government witnesses that were called were unable to provide
13 the information that you wanted the jury to hear about. The
14 government is under no obligation to call your preferred list
15 of witnesses so that you can get in what you hope to get in.
16 You could have easily, and I expect did, anticipate that there
17 could be a need to supply yourself the evidence that you
18 wanted the jury to hear. You made a tactical decision not to
19 prepare for that defense and the Court will not allow this
20 late, undisclosed expert witness to provide that information.

21 Now, have you decided whether to call Agent Atwood?

22 (Counsel and defendant conferred.)

23 MR. AMES: Yes, Your Honor, we'd like to call Agent
24 Atwood.

25 THE COURT: All right. And, Mr. Tatum, have you

1 decided whether or not to testify?

2 (Pause.)

3 THE DEFENDANT: I'm leaning towards yes, Your Honor,
4 but I'd like to hear the testimony of the agent.

5 THE COURT: All right. Then we'll need an answer
6 immediately thereafter.

7 All right. Call the jury.

8 MR. AMES: I'm very sorry, Your Honor, very briefly.
9 I referenced a few minutes ago Rule 611(c), treating him, I
10 guess, as a hostile witness in the case in chief. My
11 understanding is I'm allowed to ask somewhat leading questions
12 in that circumstance. Hostile, but I'll be as nice --
13 cheerful as I always am.

14 THE COURT: If by hostile you mean leading
15 questions, you may do that.

16 MR. AMES: Yes, hostile in that sense, but I will
17 try not to be too bad about it.

18 THE COURT: Just remember that it's the witness's
19 testimony that matters and you're not a witness.

20 MR. AMES: Yes, Your Honor.

21 THE COURT: All right.

22 (Jury entered the courtroom.)

23 THE COURT: Members of the jury, I apologize for
24 that long delay. Things went a lot longer than I anticipated
25 earlier.

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1 Is there evidence for the defense?

2 MR. AMES: Yes, Your Honor. We'd like to call Agent
3 Scott Atwood.

4 SCOTT ATWOOD, DEFENSE WITNESS, SWORN,

5 DIRECT EXAMINATION

6 BY MR. AMES:

7 Q. Could you state your name for the jury.

8 A. Hi. My name is Scott Atwood.

9 Q. And, Mr. Atwood, where do you work?

10 A. I work with the FBI here in Charlotte as a special agent.

11 Q. How long have you been doing that job?

12 A. Almost 16 years.

13 Q. Are you in any specific department or work on any
14 specific type of cases?

15 A. I work on the Crimes Against Children Task Force here in
16 Charlotte.

17 Q. Tell us a little bit about your background in that
18 regard. A little bit.

19 A. Not to bore the Court, but I've worked a number of
20 violations with the FBI and I've been working on a Crimes
21 Against Children Task Force for about the past two years here
22 in Charlotte.

23 Q. And I'm sorry, do you recall approximately when you
24 started on that task force?

25 A. I'm going to guess just about June of '21, 2021.

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1 Q. Were you on any other task force or team prior to that,
2 immediately prior?

3 A. Yes, I was here in Charlotte.

4 Q. Doing any particular type of cases immediately prior?

5 A. I was on the Surveillance Operations Group.

6 Q. What did you do there?

7 A. Surveillance.

8 Q. What kind of training or experience do you have in
9 surveillance in particular?

10 A. They teach you at the FBI academy. We do it throughout
11 the course of our duties routinely. Attend surveillance
12 courses, driving courses back at the FBI academy.

13 Q. So with respect to your -- what's your involvement with
14 this case?

15 A. I was one of the case agents.

16 Q. What does that mean?

17 A. That means you handle most aspects of the investigation.
18 Handle it from start to finish.

19 Q. And could you describe, I guess, what are some of those
20 duties? What are some of the things you've done in this case?

21 A. I started the case. I got information from my supervisor
22 about the information that was referred to our office. I
23 interviewed people. I conducted review of digital evidence.
24 Made arrests. Worked with the U.S. Attorney's Office.

25 Is that what you're talking about?

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1 Q. Yeah. So you had a pretty significant role in the
2 prosecution of Mr. Tatum.

3 A. Not the prosecution, but the investigation, yes, sir.

4 Q. The investigation leading to the prosecution. Gathering
5 the evidence and such.

6 A. Yes, sir.

7 Q. You said you initially got a report from your supervisor?

8 A. Correct.

9 Q. Who was the supervisor?

10 A. Kevin Swanson.

11 Q. Where does he work out of?

12 A. Out of the Charlotte office.

13 Q. And what was that report?

14 MR. ODULIO: Objection. Calls for hearsay.

15 THE COURT: Sustained.

16 Q. When you received the report, what did you do next?

17 A. I read the information, the referral of information, and
18 it contained -- the referral was that someone else had
19 firsthand knowledge of Mr. Tatum --

20 MR. ODULIO: Objection to this, Your Honor.

21 THE COURT: No, that's fine. Finish that sentence.

22 THE WITNESS: The referral of information was that
23 Mr. Tatum -- the referral of the information was from a person
24 who had firsthand knowledge of Mr. Tatum possessing images of
25 young girls clothed and unclothed on his computer.

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1 Q. And what did you do after that when you received
2 information?

3 A. The referral also indicated that Mr. Tatum was a doctor
4 at Atrium Health and that he worked with children. And so
5 being that that's what we do on the Crimes Against Children
6 Task Force, our utmost important responsibility is protecting
7 children who are being victimized. Being we knew or suspected
8 he had access to children on a routine basis, we sought to
9 prove or disprove the information that was referred to our
10 office. So we sought out the person who reportedly had the
11 firsthand information and that was Kimberly Tatum, Mr. Tatum's
12 wife.

13 Q. And at that point in time did you go and meet with
14 Ms. Tatum?

15 A. We did. The referral said that Ms. Tatum wanted to meet
16 with her attorney present. So I contacted her attorney listed
17 in the referral and they agreed to set up a meeting between
18 myself, Agent Brown, and Ms. Tatum at her attorney's office.

19 Q. Who else was present at that meeting, if you recall?

20 A. Her attorney?

21 Q. No. Was there any other people from the government or
22 FBI involved?

23 A. Not that I recall. I think it was just Agent Brown and
24 myself.

25 Q. During that meeting did you -- were you provided any

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1 evidence or given anything?

2 A. Yes. Ms. Tatum provided us with a number of electronic
3 devices that she said Mr. Tatum used --

4 MR. ODULIO: Objection, hearsay, Your Honor.

5 THE COURT: Don't tell us what she said.

6 THE WITNESS: Sorry.

7 Q. I'm sorry. Go ahead.

8 A. Ms. Tatum provided us a number of electronic devices.

9 Q. What were those devices?

10 A. External hard drives, cell phones. That's what I
11 remember.

12 Q. How many devices were there?

13 A. I don't recall exactly.

14 Q. So you said hard drives -- I'm sorry. You said hard
15 drives, cell phones. Anything else?

16 A. Not that I recall.

17 Q. Were there any thumb drives?

18 A. Yes, there were thumb drives.

19 Q. How many thumb drives?

20 A. One.

21 Q. Did -- did you review any of these items at the lawyer's
22 office?

23 A. No, not at the lawyer's office.

24 Q. Did she bring any items that you did not seize or take
25 from her?

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1 A. Did I bring any items?

2 Q. No, I'm sorry. Did Ms. Tatum bring any other items with
3 her that she brought that you didn't take at that point in
4 time?

5 A. In regards to the information, the referral of
6 information, no.

7 Q. At that meeting I mean.

8 So she brought a number of devices. Were there any that
9 you didn't take that she offered to you?

10 A. No.

11 Q. Okay. Was this a -- what were the circumstances of the
12 seizure? Was it based upon a search warrant? Was it based
13 upon consent? What was it?

14 A. She gave it to us.

15 Q. Okay. So it was consensual?

16 A. The giving of the devices?

17 Q. Yes.

18 A. Yes.

19 Q. Those devices you mentioned, there was a hard drive?

20 A. Yes.

21 Q. And cell phones.

22 And what did you do with those devices?

23 A. I took them back to the FBI, logged them in as evidence,
24 and obtained a search warrant from the federal courts to
25 examine those devices.

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1 Q. When did you obtain that warrant?

2 A. I can't say specifically.

3 Q. Was it that day or was it sometime later?

4 A. I'm going to guess sometime later. I cannot prepare a
5 federal warrant in a day.

6 Q. Understood.

7 Was it roughly a week later, two weeks, something in that
8 ballpark?

9 A. Honestly, I have no idea. I'd have to review my case
10 log.

11 Q. In the interim, did you look through any of the devices?

12 A. Yes, I did.

13 Q. And any other general investigation done in that time
14 frame to your recollection, I guess, beyond the meeting and
15 looking through a device?

16 A. So one of the pieces of evidence that was given to us was
17 a thumb drive. We took that back to the FBI office. We
18 plugged it into a write blocking hardware that you guys have
19 been told about. I'm not a techie so I don't understand all
20 that. But we reviewed the thumb drive that was provided and
21 we observed on the thumb drive child pornography that was
22 consistent with the referral of information.

23 Q. And so when you reviewed that, was it -- what were the
24 pictures depicting? Was it the same things that have been put
25 into evidence or was it in some other format?

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1 A. Correct, it was the same thing that's put into evidence.

2 Q. Were there any pictures of a computer screen within that
3 thumb drive?

4 A. Yes, there were.

5 Q. And you reviewed those images. In your estimation or
6 opinion, were the images that you were seeing pictures of the
7 laptop that's in evidence?

8 MR. ODULIO: Objection, opinion.

9 THE COURT: Right, as to opinion. Does it look
10 consistent to you?

11 THE WITNESS: Yes, Your Honor, it looks consistent.

12 Q. You said child pornography. Are you referring to the
13 images that we've been discussing in court regarding the
14 morphing? Is that what was on this drive?

15 A. They appeared to have been altered, correct.

16 Q. So morphed images and they're on a computer screen taken
17 as a picture with another device.

18 A. That's what it appeared to be, yes.

19 Q. And there's video of a computer screen as well.

20 A. That's correct.

21 Q. Do you recall approximately what point in time these
22 images, videos were initially created?

23 A. I do remember there being -- in part -- in opening the
24 video, that there was a timestamp on the screen and so that's
25 what we tried to reference, obviously.

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1 Q. What was the general time frame?

2 A. I have no idea.

3 Q. Was it the day before that this was reported?

4 A. I honestly -- there's been a lot of stuff and a long time
5 in this case. I cannot recall.

6 Q. Was it over a month after?

7 MR. ODULIO: Objection. Asked and answered.

8 THE COURT: That's the last one. You can answer
9 that.

10 THE WITNESS: I honestly do not know.

11 Q. You went and secured a warrant at that point, correct?

12 MR. ODULIO: Objection, Your Honor. He's asked
13 this.

14 THE COURT: Overruled.

15 THE WITNESS: No.

16 Q. I'm sorry, I'm just trying to set the table for you.

17 You went and got a warrant sometime after that, right?

18 A. No. First we -- we sought to speak to Dr. Tatum being
19 the urgency of the issue and we obtained statements from him
20 also.

21 Q. Understood. You're right. You went and approached him
22 in the parking lot of where he worked, I believe.

23 A. Correct. It's not our job to prove or disprove. So
24 we're not in the business of ruining people's lives. We
25 weren't going to go in there. We knew him to be a

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1 professional. It's not how we conduct business normally. So
2 we waited for him in an obscure area in an attempt to speak to
3 him.

4 Q. And when he came outside after work, you had a
5 conversation with him. It was in a -- I believe one of your
6 cars initially or something like that.

7 A. So first we encountered Mr. Tatum outside the vehicle as
8 he was walking towards his vehicle. Prior to that we had
9 already observed in plain view a bag that was consistent with
10 a laptop or a computer bag. And so as he approached his
11 vehicle, we approached him and identified ourselves. Asked if
12 he would voluntarily speak to us, which he agreed to do so.
13 And that exchange is where we initially obtained the laptop
14 bag from Mr. Tatum.

15 Q. At what point in time did you receive the laptop bag from
16 him? Was it, do you recall, beginning, middle, end of the
17 conversation?

18 A. So it was in the initial encounter. We -- Mr. Tatum
19 actually wanted to leave and go to a different area, which
20 being that we had already observed evidence of the crime -- in
21 our line of work, it's digital evidence so it can be easily
22 erased, obviously. And so one of our other objectives is to
23 try and secure that evidence as best we can and then we seek
24 authority from the courts to examine those devices.

25 Being that we had reason to believe that the laptop was

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1 in the vehicle, he wanted to leave, that was -- we didn't feel
2 that that could happen. So we asked for a voluntary consent
3 search of his vehicle, which he did. He walked us through
4 that, which we saw and observed a pillowcase with multiple
5 women's undergarments in there and other things. And then
6 once we got to the passenger side of the vehicle, Mr. Tatum
7 opened up the door, reached in and grabbed the laptop bag and
8 secured it on his person, and then said we can search the rest
9 of the vehicle.

10 And so during that exchange we asked him what was in the
11 bag -- sorry, let me back up. Prior to that we asked him if
12 he had a laptop, which he informed us was at his house and
13 that's another reason that he wanted to leave. However, when
14 he consented to the search of his vehicle, he reached in and
15 grabbed the bag. And when we asked him what was in the bag,
16 he said his laptop computer he remembered was in the bag. And
17 so at that time I don't remember if it was Agent Brown or
18 myself informed him that that's the reason that we were there
19 and we wanted to talk to him, and that's when we took the bag
20 from him.

21 From there we asked if he would voluntarily agree to
22 speak to us, which he agreed to. We went and sat in my
23 vehicle, Agent Brown in the front, which you've already heard,
24 Mr. Tatum and myself in the back seat, and we had a
25 discussion, which you've also heard the audio.

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1 Q. So the devices were seized and that was the laptop and
2 the thumb drive as well, correct, I believe?

3 A. So during that conversation Mr. Tatum agreed to creating
4 images of child pornography and masturbating to them --

5 Q. I'm sorry, Agent, the question was what you seized. That
6 was all.

7 A. I was trying to lead up to how we actually obtained -- we
8 didn't take everything in the bag. We just took the computer
9 and the external devices that he said he stored child
10 pornography on that he didn't say were in the bag.

11 Q. I understand. I was just asking what were the things
12 that were seized. What were they? It was a laptop and a
13 thumb drive, right?

14 A. That's the best of my recollection. I can't -- I, again,
15 would have to review my notes. That's my best recollection.
16 It was a flash drive.

17 Q. And to be clear, he did not indicate he saved child
18 pornography. He indicated he used the DeepFake website,
19 correct?

20 A. At that point in time, he said he created images of his
21 high school girlfriend that he masturbated to and he saved
22 those images on external devices.

23 Q. And you had seen those images already, correct?

24 A. I had seen images that matched the description of the
25 questions that led us to the encounter with Mr. Tatum and the

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1 questions that we were asking him about.

2 Q. But specifically, you talked about the one that he said
3 about his ex-girlfriend, right?

4 A. Correct.

5 Q. And you had seen that one?

6 A. At that point in time I didn't know who the images were
7 or what they depicted. I believed them to be under the age of
8 18. I believed them to be nude, appearing nude. I believed
9 it to be child pornography. And those were the images that I
10 was trying to ask Mr. Tatum about. It's not something that we
11 come out and ask -- most people don't answer right off the
12 bat, yes, it's child pornography, so we have a discussion
13 about it. That's why it took two or three hours.

14 Q. And so you sat with him probably from what time? I
15 understand you were waiting for him to get out of work.
16 Approximately what time did you initially engage with
17 Mr. Tatum?

18 A. I have no idea. It was after work.

19 Q. So shortly after normal work hours. It wasn't anything
20 crazy late at night or early afternoon, right?

21 A. I'm a night person. I don't really -- I can't answer
22 that honestly.

23 Q. During that period of time, had you made any arrangements
24 with Kimberly Tatum to go and search the residence?

25 A. During our initial encounter with Ms. Tatum...

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1 Q. What was that arrangement?

2 A. No, that was not the answer, I apologize. I didn't
3 complete that statement because it was hearsay and something
4 that Ms. Tatum told me.

5 Q. It's not self objection. I'm asking --

6 MR. ODULIO: I'll do it, Your Honor. Objection,
7 hearsay.

8 Thank you, Agent Atwood.

9 THE WITNESS: Sorry.

10 MR. AMES: That was convenient, I suppose.

11 Q. So was there an arrangement or discussion -- did you tell
12 her anything or was there a discussion about going to the
13 house to get any items later that day or evening?

14 MR. ODULIO: Same objection, Your Honor.

15 THE COURT: Overruled. You can answer that.

16 THE WITNESS: Your Honor, respectfully I'm not -- I
17 don't know how to answer the question without --

18 THE COURT: All right. Let me ask the question,
19 then. See if I can help.

20 During the course of this initial meeting and based
21 upon that meeting, did you and other agents make a plan to
22 visit the home and take possession of certain items?

23 THE WITNESS: Being that our first priority was
24 speaking to Mr. Tatum, Agent Brown and myself decided that we
25 would go to his place of employment to attempt to speak to

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1 him.

2 As I already explained about the preservation of
3 digital evidence, we believed there to be other devices at
4 Mr. Tatum's home that he had access to to store information
5 and so, yes, I -- we sent a team over there to attempt to
6 gain -- to attempt to gather those pieces of evidence.

7 THE COURT: Thank you.

8 BY MR. AMES:

9 Q. And the -- and the gathering of those pieces of evidence
10 was not done with a search warrant, correct?

11 A. No, it was done by consent from Ms. Tatum.

12 Q. And the time frame in which that consensual search of the
13 home occurred was when, to your knowledge?

14 A. The time frame area, you're asking was it simultaneously
15 to us speaking to Mr. Tatum?

16 Q. Yes.

17 A. That is correct.

18 Q. Did you call Kimberly Tatum or anybody else in the
19 household in advance to tell them what time to expect agents
20 to arrive?

21 MR. ODULIO: Objection, Your Honor.

22 THE COURT: Overruled. Did you do that?

23 THE WITNESS: I'm not sure. I'm not sure.

24 Q. Did you call another agent to -- did you call another
25 agent to inform him about what time to arrive?

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1 A. Again, two years ago. This is a lengthy investigation.
2 We carry 15 investigations routinely. The best of my
3 recollection would have been probably -- in these sorts of
4 cases, the offenders are sometimes violent. I would not have
5 sent my own colleagues in blindly. If there was a consent
6 search set up, it would have been speak to this person at this
7 address. It's possible that that could have occurred.

8 I did not know -- we did not know if Mr. Tatum -- where
9 he would go after we spoke to him. We were not interested in
10 arresting him. That's why the consent conversation with him
11 was voluntary. We suspected that he was going to go back to
12 his house and have access to all of those devices.

13 So that was the plan was to obtain those devices that we
14 thought were in question.

15 Q. And you in that -- so you seized them, you said before,
16 from Mr. Tatum from the vehicle, correct? That was not -- the
17 search of the inside of the car, I guess, was maybe
18 consensual. But the seizure of the backpack devices was not,
19 right?

20 A. So the way we actually obtained the laptop, which is what
21 I was trying to get to, was when we informed Mr. Tatum -- or
22 when Mr. Tatum decided he was free to leave and he wanted to
23 leave the interview with Agent Brown and myself, he wanted his
24 car keys and identification and reached for the laptop bag at
25 that point in time. Being that we had already established

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1 that the laptop was in there and contained images of child
2 pornography, we had to do an inventory of that bag being that
3 there was potential evidence in there.

4 And so at that time we did an inventory search of the
5 bag. We took items that we thought were pertinent to our
6 investigation. We informed him of that. We gave him a
7 receipt for it. This is what we're taking. We didn't examine
8 those devices then. We just took physical possession of the
9 items that Agent Brown presented to you. And then that's when
10 we obtained the search warrant to examine them.

11 Q. All right. But in other words, he didn't voluntarily
12 hand those things over, correct?

13 A. No. We had already established they contained child
14 pornography.

15 Q. Understood. But the question I asked was he didn't
16 voluntarily hand you those two devices, did he?

17 A. No, sir, he did not.

18 Q. Those were seized from him, correct?

19 A. That is correct.

20 Q. Without his consent.

21 A. Sure.

22 Q. And simultaneously while that's happening, meanwhile at
23 his home there are agents meeting with Kimberly Tatum to seize
24 more items with her consent, correct?

25 A. That is correct. I think the jury has already heard that

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1 they only searched items that were used jointly between
2 Kimberly and Mr. Tatum.

3 Q. I want to just pose a hypothetical to you if I can.

4 Had David Tatum been at his home that night when the
5 officers arrived, would he have consented to the seizure of
6 these items?

7 MR. ODULIO: Judge --

8 THE COURT: Sustained.

9 Q. Okay. Bad question, then.

10 What time do you -- I mean, you met with him for a period
11 of time. Do you know how long the other agents were at the
12 home that were seizing the items with the wife's consent?

13 A. I have no idea.

14 Q. Do you know what items they seized?

15 A. I don't honestly. I can't remember.

16 Q. You stated that the only things coming into evidence were
17 things that the family -- or Mr. Tatum and Kimberly jointly
18 used; is that correct?

19 A. Yes.

20 Q. And those devices are the things that were sitting up
21 there earlier. The MacBook that was jointly used.

22 A. To my best recollection --

23 MR. ODULIO: Objection, hearsay, Your Honor.

24 THE COURT: No, go ahead and answer that.

25 THE WITNESS: I believe the MacBook to be jointly

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1 used.

2 Q. And as well as, I guess, there was -- well, cell phone
3 probably not, but the -- what else was there?

4 Oh, the hard drive. Where did that one come from?

5 A. I believe there were two hard drives potentially that
6 Ms. Tatum gave to us. One that she took from the laptop bag
7 in question when we encountered Mr. Tatum, either the -- I
8 can't remember.

9 Q. So she took that out of the bag. He didn't have that
10 with him on his person, correct?

11 A. No, because she said --

12 MR. ODULIO: Objection, Your Honor.

13 THE COURT: Sustained.

14 Q. Okay. She had it with her at that initial meeting?

15 A. She did.

16 Q. And that device was given to you at that initial meeting
17 along with the thumb drive and such, correct?

18 A. Yes, it was.

19 Q. And this -- you said there were two. Was one of those
20 devices the one that's in evidence right now?

21 A. Yes, it is. It's the Western Digital My Passport.

22 Q. And was that device password protected?

23 A. To the best of my recollection, it was.

24 Q. And did Kimberly Tatum provide you with any password or
25 access to that device?

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1 A. She said --

2 THE COURT: Sustained.

3 Q. The question wasn't what she said. The question was did
4 she provide you, give you a way to get into it?

5 A. No. She...

6 Q. Did she know how to get into it?

7 MR. ODULIO: Objection, Your Honor.

8 THE COURT: His answer was complete. He said no.

9 Q. Was there any way to get into it even with her
10 assistance?

11 MR. ODULIO: Objection, Your Honor.

12 THE WITNESS: I don't know how to answer that.

13 THE COURT: Sustained.

14 Q. Did you have -- did you have to send the device to
15 Quantico, Virginia, in order to get into the device?

16 A. Yes, we did.

17 Q. So it required that -- it was taken out of Mr. Tatum's
18 bag supposedly and provided to you by the wife as a jointly
19 used item?

20 A. I didn't say that the Western Digital was jointly used.

21 Q. Is it your opinion that it wasn't?

22 A. I don't have an opinion on that.

23 The MacBook was jointly used.

24 Q. Okay. You sat in this meeting. Obviously, you were
25 gathering information and evidence. Did Mr. Tatum, to your

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1 recollection, talk at all about any devices?

2 MR. ODULIO: Objection, Your Honor.

3 THE COURT: Sustained.

4 Q. Or did you question him about any other devices?

5 A. I remember we had a discussion about where Mr. Tatum
6 liked to store the images that we were asking him about, the
7 child pornography images, and he said that he stored them on
8 thumb drives that he kept in his desk at the home.

9 Q. Is that what he stated or did -- when you asked about the
10 location of a thumb drive, he said he thought it was in his
11 office or a desk at home, something to that effect?

12 A. Yes, that's correct.

13 Q. Okay. During the time period where you were interviewing
14 him, you said that's a couple of hours, roughly.

15 A. I believe so.

16 Q. And was he trying to -- was he doing anything other than
17 speaking with you?

18 A. Are you referring to was he making telephone calls?

19 Q. Was he making telephone calls?

20 A. He made a number of telephone calls.

21 MR. ODULIO: Objection, Your Honor.

22 THE COURT: Overruled.

23 Q. How many telephone calls approximately?

24 A. I couldn't even tell you.

25 Q. Were you able to learn who he was calling or trying to

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1 call?

2 A. Yes.

3 Q. Who was he trying to call?

4 A. He was trying to call his father-in-law, Kimberly Tatum's
5 father.

6 Q. Do you know who Kimberly Tatum's father-in-law is?

7 A. His name is -- I'm drawing a blank right now. Is it
8 Mr. Martin?

9 Q. Do you know whether or not Mr. Martin was at the home at
10 that moment in time when these calls were being made?

11 A. I'm not -- I can't say for sure. I think -- I think he
12 was. I don't know if he was there during or after.

13 Q. Have you spoken with Mr. Martin as part of this
14 investigation?

15 A. Yes, we have. We spoke to him one time when we spoke to
16 Ms. Tatum at her home at -- or during the investigation. Mr.
17 and Mrs. Martin were there and we spoke to them.

18 Q. And so it was clearly -- to your recollection, did David
19 ever get through to anybody he was trying to call?

20 A. No. To the best of my recollection, he -- the calls went
21 unanswered.

22 Q. Are you aware of or did you -- were you aware of anybody
23 having a conversation with Mr. Martin or any -- Mr. Martin
24 prior to this consensual search of the residence?

25 MR. ODULIO: Objection, hearsay.

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1 THE COURT: Just as to whether you know of any such
2 conversations, not what they were.

3 THE WITNESS: At this point in the investigation,
4 not well into the investigation, did we -- Agent Brown --
5 well, I'm not going to speak for Agent Brown, but well into
6 the investigation did I even know who Mr. Martin was. I did
7 not know him.

8 Q. I guess more or less what I'm driving at here is that
9 you're doing -- you're over here speaking with Mr. Tatum.
10 There's other people and other agents and other things going
11 on at the residence. And I'm just asking if you're aware did
12 anybody have any conversations with Ms. Tatum, her father,
13 anyone else in the residence about what to do if Mr. Tatum
14 calls someone over there?

15 THE COURT: Sustained. The only way he would know
16 the answer to that is by hearsay.

17 Q. Did you ever give instructions to Ms. Tatum or her family
18 not to answer his phone calls if he tried to call over there?

19 MR. ODULIO: Objection. Same objection, Judge.

20 THE COURT: No, you can tell us what instructions,
21 if any, you gave anyone else.

22 THE WITNESS: I did not give any instructions to not
23 answer the phone call. I'm not sure where that's coming from.

24 Q. Did you call anyone in advance of the consent search at
25 the residence or otherwise?

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1 A. I do not recall. That's not normally how I would conduct
2 business. I would have informed my colleagues about who and
3 what to do once they got there.

4 Q. Is there a particular -- I think you elaborated perhaps,
5 but was the particular reason that you did these
6 simultaneously because you wanted to gather the evidence
7 while -- from the home while Mr. Tatum was not there?

8 A. So prior to attempting to speak to Mr. Tatum and
9 conducting the search at the home, we had obtained referral
10 information there was child pornography potentially on
11 Mr. Tatum's devices. We had observed information that backed
12 up the referral of information. And so our job at that time
13 is to attempt to validate and preserve the evidence.

14 So, yes, there was a simultaneous agreement to attempt to
15 seize any potential evidence that's at the home. Obviously, I
16 think that's understandable, in conducting investigations over
17 16 years, that if the person who resides in the home is
18 conducting crimes linked to digital evidence, that it's going
19 to be secreted. Thumb drives are stashed wherever and we've
20 missed some throughout the years. So that was part of the
21 plan is to conduct a simultaneous search in addition to the
22 interview.

23 Q. And was Mr. Tatum made aware that while he was in your
24 custody in the parking lot, that his home was being searched
25 by other agents?

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1 A. I'm not sure about -- I'm not sure of that. I'm not sure
2 that I -- he was aware of that.

3 Q. Did you ever tell him or give him any information that
4 we're simultaneously right now going and looking through your
5 home and seizing other devices and electronics?

6 MR. ODULIO: Objection to the relevance of this.

7 THE COURT: Sustained.

8 Q. Did you ever give him an opportunity to object to the
9 seizure of any items in his home?

10 MR. ODULIO: Objection, Judge.

11 THE COURT: Sustained.

12 Mr. Ames, to the extent your questions are addressed
13 to legal issues and the legality of the seizures, those are
14 issues for the Court that have already been decided by the
15 Court --

16 MR. AMES: Understood, Your Honor.

17 THE COURT: -- and need not be further explored for
18 those purposes.

19 BY MR. AMES:

20 Q. After you -- after you disembarked with Mr. Tatum, after
21 that you went and obtained a search warrant, correct?

22 A. Correct, after we obtained all the devices and had a
23 chance to breathe. It was a lengthy 24 hours.

24 Q. And so what was the basis for that -- was the basis for
25 the search warrant anything in addition to the investigation

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1 or is it the thumb drive that you had looked at on the 22nd?

2 MR. ODULIO: Objection, relevance. Calls for a
3 legal conclusion.

4 THE COURT: Sustained.

5 Q. Did you do an investigation into whether or not Dr. Tatum
6 ever harmed any patient or abused any patient?

7 MR. ODULIO: Objection, relevance.

8 THE COURT: Sustained.

9 Q. Did you do any investigation into his job at Atrium
10 Health?

11 MR. ODULIO: Objection, relevance.

12 Q. You already testified --

13 THE COURT: You can answer that. Did you do any
14 such investigation?

15 THE WITNESS: We verified that he was employed as a
16 psychiatrist at Atrium Health.

17 Q. Did you do any investigation as to whether or not there
18 had been any improper behavior or inappropriate --

19 MR. ODULIO: Objection, Your Honor.

20 THE COURT: Sustained.

21 MR. AMES: I understand, Your Honor, but his initial
22 testimony is the whole --

23 THE COURT: Sustained. Don't -- don't need an
24 explanation.

25 MR. AMES: I understand.

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1 THE COURT: The reason for your asking the question
2 was disallowed. Just ask another question.

3 Q. Where did you go from there in your investigation?

4 A. Once we obtained the search warrant, we sought to examine
5 the devices to see if they contained any child pornography.

6 Q. Did you -- when did you search the -- when did you start
7 looking through those devices, approximately what time frame?

8 A. I can't say specifically. Probably a week or two later.

9 Q. And one of the devices -- you said that one was sent to
10 Quantico for -- to try to get into that device, correct?

11 A. Correct.

12 Q. And that's a device that -- withdrawn, Your Honor.

13 Have you had subsequent contact with Ms. Tatum or anybody
14 else in her family as part of the investigation?

15 A. As -- throughout the investigation we -- Ms. Tatum
16 provided information periodically. But we did our best to
17 limit our exposure to Ms. Tatum, so much so that as we met
18 with her in preparation --

19 MR. ODULIO: Objection, Your Honor. Relevance as to
20 this answer.

21 THE COURT: Sustained.

22 Q. I understand. But she provided a lot of information to
23 you, correct?

24 MR. ODULIO: Objection. Same objection, Your Honor.
25 This is hearsay as well.

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1 THE COURT: Sustained.

2 Q. When you're reviewing -- I imagine you were here for
3 Mr. Whitt and his testimony about the process of reviewing
4 these devices; is that correct? You were present for that
5 part?

6 A. Did I hear the testimony?

7 Q. Yes.

8 A. Yes.

9 Q. And part of that, as he testified, there are
10 circumstances -- sometimes he's looking through devices and
11 flagging things, sometimes vice versa. Do you recall flagging
12 any items in an HP Pavilion desktop?

13 A. I do, yes.

14 Q. And do you recall doing so in any -- in any of the other
15 devices, just flagging anything and reviewing it?

16 A. There were a number of devices seized in this case. I
17 reviewed most of them and flagged multiple items.

18 Q. How many total devices have been seized at this point,
19 approximately?

20 A. I think there's probably 20ish.

21 Q. And the forensic searches that have been conducted, does
22 that include -- I mean, includes broad, broad strokes,
23 correct? There's a lot of images that are gone through both
24 by the analyst and by the agents, correct?

25 A. Yes.

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1 Q. And was -- is it fair to say there's a significant amount
2 of pornography that was found on the devices seized from David
3 Tatum?

4 A. There was a good bit.

5 Q. In terms of images and videos, thousands and thousands;
6 is that fair to say?

7 A. I can't say. I wouldn't want to speculate on that. I
8 didn't --

9 Q. It's a lot. We can put it that way.

10 A. It's a good bit.

11 Q. And the vast majority of that was adult pornography and
12 was not submitted here in court today, correct?

13 A. There was a good bit of adult pornography.

14 Q. And I imagine -- or I guess are you familiar with the
15 term pthc?

16 A. I am.

17 Q. And how -- you've worked with cases before in the last
18 couple years that involve material of that variety.

19 A. Correct.

20 Q. What, in your experience, does that generally entail when
21 you -- that kind of material?

22 MR. ODULIO: Objection, Your Honor.

23 THE COURT: Sustained.

24 Q. The images that you reviewed that are entered into
25 evidence, there's other adult images that were not entered; is

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1 that correct?

2 MR. ODULIO: Objection, relevance. Your Honor, he's
3 not charged with adult --

4 THE COURT: Right, of course he's not. Of course
5 he's not. And I don't think it's particularly relevant, but
6 you can answer that question.

7 Were there images of adult pornography that were not
8 offered into evidence?

9 THE WITNESS: Yes.

10 Q. And did that include some of the morphed images? Were
11 there adults and people that were also morphed and put into
12 evidence -- or not put into evidence?

13 MR. ODULIO: Objection, Your Honor.

14 THE COURT: Sustained.

15 Mr. Ames, the Court wouldn't have allowed adult
16 pornography into evidence. It wouldn't be relevant or
17 admissible.

18 MR. AMES: I'm sorry, that adult pornography would
19 not be relevant?

20 THE COURT: Your question has been ruled irrelevant.

21 MR. AMES: Understood, Your Honor.

22 Q. From there, Agent Atwood, there was a device that was
23 sent to Quantico. It comes back. Eventually later on in the
24 investigation some charges came. What -- did you arrest
25 Dr. Tatum at one point in time after there were charges?

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1 A. Yes, we did.

2 Q. Subsequent to that did you conduct a review of any
3 other -- or more devices at any point?

4 A. Yes, we did.

5 Q. Did you do any -- did you conduct any review of the
6 MacBook laptop in particular?

7 A. I did review the MacBook on multiple occasions.

8 Q. Did you -- when you're doing your analysis or
9 investigation, did you look to determine if there was any
10 spyware on the device?

11 A. I can't say that I did specifically.

12 Q. Okay. Did anybody to your knowledge?

13 A. Not to my knowledge. I wouldn't know.

14 Q. Was the FBI informed at any point in time that there may
15 have been spyware on the device?

16 MR. ODULIO: Objection. Calls for hearsay.

17 THE COURT: Sustained.

18 Q. Have you had conversations with anybody else -- or did
19 you have -- did your investigation involve anybody else in
20 Ms. Tatum's family?

21 A. No, our investigation did not involve anyone else or
22 focus on anyone else but Mr. Tatum.

23 Q. The -- did you have any more recent conversations with
24 anybody in Ms. Tatum's family?

25 MR. ODULIO: Objection, Your Honor.

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1 THE COURT: Sustained.

2 Q. Have you learned anything about the evidence in the FBI's
3 custody that turned out to not be the original copy?

4 THE COURT: Sustained.

5 MR. ODULIO: Objection.

6 Q. Have you learned anything recently that involves
7 additional copies of evidence?

8 MR. ODULIO: Objection. Sidebar, Your Honor.

9 THE COURT: Yes.

10 (Sidebar conference as follows:)

11 MR. ODULIO: We object to this whole line of
12 questioning. We think it's irrelevant. The Court's already
13 ruled on aspects of this line of questioning. As such, I
14 think it's clear that it's got no relevance here in the case.

15 MR. AMES: I don't think I've crossed the line.
16 There's a motion in limine with regard to talking about
17 criminal charges involving family. Again, I've told the Court
18 I don't intend to do that. I think it's relevant that a
19 device that was purported to be an original turned out not to
20 be.

21 THE COURT: First of all, that's a gross
22 overstatement of that particular device. It hasn't been
23 offered into evidence. And it was a predicate to initiate the
24 investigation. So that line of questioning is irrelevant for
25 our purposes today. So let's get away from your suppression

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1 theory of there were these flash drives that were handed over
2 to the FBI at the beginning of the investigation and there's
3 something wrong with them. We're not going there anymore.

4 MR. ODULIO: Your Honor, we'd also ask if there's
5 more questions like this, if the Court can consider some kind
6 of limiting instruction to the jury concerning the legal
7 process here because I don't like the implication.

8 THE COURT: Yeah.

9 MR. ODULIO: It's not fair.

10 THE COURT: We'll take that up at jury instructions,
11 but you are inviting the Court to give an instruction that
12 essentially says you're wrong. Okay. So --

13 MR. AMES: No, I --

14 THE COURT: -- tread carefully.

15 MR. AMES: I understand, Your Honor. And I'll speak
16 with Mr. Tatum about the circumstance and let him know that as
17 well.

18 THE COURT: All right.

19 (End of sidebar conference.)

20 DIRECT EXAMINATION (Cont'd.)

21 BY MR. AMES:

22 Q. How many investigations in general have you done for
23 pornography-type cases?

24 A. Quite a bit.

25 Q. And the style or type of images that you would typically

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1 see in a file called pthc, could you give an overview -- what
2 does that generally in your experience entail if you open an
3 image that says pthc on it?

4 MR. ODULIO: Objection, Your Honor.

5 THE COURT: Sustained. We're not here about
6 generalities. Ask another question.

7 (Counsel and defendant conferred.)

8 BY MR. AMES:

9 Q. Would you categorize or characterize the images submitted
10 into evidence to be hardcore in this case?

11 MR. ODULIO: Same objection, Your Honor.

12 THE COURT: Sustained. That's not an element of the
13 offense.

14 MR. AMES: Agreed, Your Honor.

15 Q. So are some of the images that you have reviewed
16 inconsistent with pornography in light of the fact there's not
17 lasciviousness?

18 MR. ODULIO: Objection, Your Honor.

19 THE COURT: Sustained.

20 MR. ODULIO: It's the same question.

21 THE COURT: Sustained. The evidence will be
22 submitted to the jury, the jury will receive the Court's
23 instructions, and the jury will find the facts that you are
24 now exploring.

25 Q. What are the criteria that you use when you flag an image

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1 as potential child pornography in your investigations?

2 A. Whether they look like a child and they're naked.

3 Q. So that's the entirety. Are you making any
4 determinations otherwise? Just nudity and age?

5 A. I'm not making the determination. I'm flagging it for my
6 review. I ask my colleagues to review who also have similar
7 experiences. I look for characteristics, hip width, breast
8 size, prepubescent, facial features.

9 Q. Understood. And when you have -- when you have images
10 that you've located, are there any processes that you use to
11 verify whether they have been previously indicated as
12 pornographic or --

13 MR. ODULIO: Objection, Your Honor.

14 THE COURT: You can answer that.

15 THE WITNESS: Can you restate the question, please.

16 Q. Is there a database you might send images to to confirm
17 whether or not they may be pornographic or previously
18 identified as child pornography?

19 A. Are you asking about NCMEC?

20 Q. Yes.

21 A. Yes. That's one of the criteria that we would do
22 normally in our investigations. If we see images that we
23 think are child pornography that fit the criteria, we have a
24 way to submit those images to NCMEC based off the hash ID.
25 You've been given information already about the hash ID and

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1 how it changes. A cache image is different -- it's my
2 understanding that a hash ID for cache images is different
3 than a regular image itself. So the hash ID sometimes can
4 be --

5 MR. ODULIO: Objection to the narrative.

6 THE COURT: No, that's fine. Probably be helpful to
7 the jury.

8 THE WITNESS: The hash ID can be invalid a lot of
9 times as far as submission.

10 Q. Did you submit any in this case?

11 A. Yes, we did.

12 Q. Did you get any matches for child pornography?

13 A. To the best of my -- so NCMEC will not -- NCMEC only
14 advises that it's child pornography if the victim has been
15 identified. So that's two separate things. We submit the
16 submission to NCMEC --

17 MR. ODULIO: Objection. This is all hearsay, I
18 think, Your Honor.

19 THE COURT: It's fine. This will be helpful to the
20 jury.

21 THE WITNESS: We submit the hash ID to NCMEC of
22 suspected child pornography or just if NCMEC knows of the
23 image. That's really the submission. Because NCMEC is the
24 houser of child pornography submitted by law enforcement. If
25 we suspect it being child pornography, we'll submit the hash

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1 ID. NCMEC will tell us, yes, that hash ID has been submitted
2 before, meaning other law enforcement has encountered that
3 image or, yes, this hash ID matches this victim.

4 And so we've done both of those in this case. We
5 submitted the hash IDs to see if NCMEC knows of any potential
6 victims and we've submitted victim notifications to where the
7 in-person victims that you've heard from today now have
8 notifications in NCMEC.

9 Q. So with respect to images that were otherwise on devices
10 that were not morphed pornography or whatnot, at any point in
11 time in the investigation, was there ever an indication or a
12 match to NCMEC or any other database that confirmed identified
13 child pornography?

14 MR. ODULIO: Objection, Your Honor.

15 THE COURT: Sustained. It's irrelevant and a
16 wrongly worded question at that.

17 Q. Was there ever a hash tag match at any point in time with
18 anything you found in the 20 devices that confirmed or
19 identified that it was --

20 MR. ODULIO: Objection, Your Honor. It's the same
21 question.

22 THE COURT: Sustained. That match doesn't make it
23 or not make it child pornography. As the witness just
24 testified, that match only identifies whether that image has
25 been previously identified by another law enforcement agency.

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1 The ultimate question for the jury is whether the images that
2 have been presented to it are in and of themselves child
3 pornography, not whether NCMEC has copies of them.

4 MR. AMES: I understand.

5 THE COURT: So that line of questioning is
6 irrelevant. Please move on.

7 MR. AMES: One moment, Your Honor.

8 (Counsel and defendant conferred.)

9 THE COURT: Any additional questions, Mr. Ames?

10 BY MR. AMES:

11 Q. Agent Atwood, did you ever, later on in the
12 investigation, seize any other items from Mr. Tatum at any
13 point as well?

14 A. Yes, we did.

15 Q. Those were not -- those did not contain any contraband,
16 correct?

17 MR. ODULIO: Objection, relevance.

18 Q. To your knowledge.

19 THE COURT: You can answer that.

20 THE WITNESS: I would have to look at the list -- I
21 don't believe so -- of when they were seized.

22 (Counsel and defendant conferred.)

23 MR. AMES: No further questions, Your Honor.

24 THE COURT: Any cross examination?

25 MR. ODULIO: Your Honor, no.

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1 THE COURT: All right. Thank you. You may stand
2 down, Agent.

3 THE WITNESS: Thank you, Your Honor.

4 (Witness stepped down.)

5 THE COURT: Further evidence for the defense?

6 (Counsel and defendant conferred.)

7 THE COURT: Mute your microphone, please.

8 MR. AMES: Yes, Your Honor.

9 (Counsel and defendant conferred.)

10 THE COURT: Further evidence for the defense,
11 Mr. Ames?

12 (Counsel and defendant conferred.)

13 MR. AMES: I'm sorry, Your Honor, I'm trying to...

14 THE COURT: I understand.

15 THE DEFENDANT: Your Honor, I was not --

16 THE COURT: Wait, wait. No, no, don't speak in open
17 court.

18 Members of the jury, let me ask you to retire to the
19 jury room for just a few minutes.

20 JUROR NO. 4: We know the rule.

21 JUROR NO. 13: Just getting our steps in.

22 (Jury exited the courtroom.)

23 THE COURT: What did you want to say, Mr. Tatum?

24 THE DEFENDANT: So I wasn't expecting to have to
25 testify today. I am not -- my lawyer has advised me not to

1 testify.

2 THE COURT: I don't -- really, really don't want to
3 know what you and he said to one another.

4 THE DEFENDANT: Okay. You know, I think that --
5 should I testify I'd like to be able to tell my story. I'd
6 like to be able to explain what happened in a narrative
7 fashion.

8 THE COURT: No, sir. No. Examinations go as you've
9 seen, question and answer, because some of what witnesses
10 might otherwise say would be inadmissible and the only way for
11 the Court to police that is to hear the question and make a
12 determination whether the answer to that question would be
13 admissible. So you won't be able to testify in a narrative
14 fashion.

15 THE DEFENDANT: And I wouldn't be allowed to testify
16 about anything regarding hearsay.

17 THE COURT: Correct.

18 MR. AMES: Unless there's an exception to it.

19 THE COURT: Right. There are some exceptions, but
20 I -- I'm trying to guess what of those might apply here, but
21 none of them are obvious to me.

22 So I need your decision, Mr. Tatum.

23 (Pause.)

24 THE DEFENDANT: Would I be allowed to testify
25 tomorrow?

1 THE COURT: No, sir. We're not going to waste an
2 hour of trial time. The testimony will begin today. I don't
3 know if it will conclude today. We'll just have to see how it
4 goes, but it will certainly begin today.

5 THE DEFENDANT: Will I have additional time to
6 confer with my attorney before testifying?

7 THE COURT: You mean before making the decision? We
8 have an hour left in the day roughly and the jury has already
9 lost a good bit of it because of some of these issues which
10 were easily anticipated, I'm sure were anticipated, and much
11 discussed between you and your attorney. I'm not going to
12 continue to waste the jury's time while you continue to wonder
13 whether to testify. It's just time to decide.

14 MR. AMES: I advise against it.

15 THE DEFENDANT: I choose not to testify.

16 THE COURT: Thank you, sir.

17 I think that -- the Court is satisfied that the
18 defendant is fully aware of his right both to testify and not
19 testify. I'm also well persuaded that he has had lengthy
20 discussions with his attorney on that issue and has made a
21 considered and thoughtful decision not to testify.

22 Would there be any other evidence, then, Mr. Ames?

23 (Counsel and defendant conferred.)

24 MR. AMES: I think the defense would rest, Your
25 Honor.

1 THE COURT: All right. I'll ask you to make that
2 announcement once the jury comes back just to let them hear
3 it. I'll ask if there's additional evidence, at which point
4 you can rest your case.

5 Will there be rebuttal evidence?

6 MR. ODULIO: No rebuttal, Your Honor.

7 THE COURT: All right. Well, then, the Court's plan
8 is that, you know, I have just a very few minutes of general
9 instructions; and since we have some time on our hands, I'll
10 give those. But I won't ask counsel to begin closing
11 arguments tonight. There's no way we'll get through that. So
12 you can be prepared for that at 9:00 tomorrow morning.

13 MR. AMES: Your Honor, is there another jury
14 instruction to deal with?

15 THE COURT: Well, there was one. I've been thinking
16 about that since. You wanted the Court to explain to the jury
17 that the evidence with respect to count two consists only of
18 bathroom video one and, you know, I may be able to just say
19 that rather than putting it into the written instructions.

20 MR. ODULIO: That's fine, Your Honor. If the Court
21 wants something in writing, we'll work with Mr. Ames to give
22 that to you, but I think doing it verbally is fine.

23 THE COURT: All right. Let's bring the jury.

24 (Jury entered the courtroom.)

25 THE COURT: Is there further evidence for the

1 defense?

2 MR. AMES: No, Your Honor.

3 THE COURT: Any rebuttal evidence?

4 MR. ODULIO: No, Your Honor.

5 THE COURT: All right. Members of the jury, that's
6 the close of all of the evidence that either party wishes to
7 offer. We have three things left to do. One, I have a set of
8 instructions that I give every jury in every criminal case
9 because these things apply to every criminal case. Then in
10 the morning we will have closing arguments from counsel and
11 then my concluding instructions which are specific for this
12 case and these offenses. And so all we're going to do yet
13 this afternoon, and it won't take me very long, is to go
14 through these instructions that apply in every criminal case.
15 And then I'll release you for the evening.

16 As I told you in the preliminary instructions, it is
17 your duty and your responsibility in this trial to find the
18 facts. You may find those facts only from the evidence which
19 has been presented during this trial. The evidence consists
20 of the testimony of the various witnesses, the exhibits which
21 have been admitted into evidence by the Court, and any
22 stipulation between the parties. Although I don't believe the
23 parties did stipulate to any facts.

24 In reaching your decision as to the facts, it is
25 your sworn duty to follow the law as the Court instructs you.

1 You will apply this law to the facts that you find from the
2 evidence and render your verdict.

3 If during their closing arguments the attorneys
4 refer to concepts of the law or what the law is, and if you
5 detect any difference between what they say the law is and
6 what I say the law is, you go with what I say. And same with
7 the facts. If the lawyers recite the evidence to you and it
8 doesn't agree with your memory, you're to be guided by your
9 memory and not what the attorneys say.

10 I'm confident that none of the attorneys would
11 intentionally misstate the law or the facts, but mistakes can
12 be made with respect to the law and people's memories differ
13 on what the evidence is. But you always go with what I say
14 about the law and what you remember about the facts.

15 You are required to perform these duties without
16 bias, prejudice, or sympathy for either party. The law does
17 not permit jurors to decide cases on the basis of bias,
18 prejudice, or sympathy, or any other basis than on the facts
19 and the law.

20 This case involves charges brought against the
21 defendant by a bill of indictment. You are reminded that an
22 indictment is but a formal method of accusing the defendant of
23 a crime. Its purpose is to inform the defendant of the
24 charges against him and bring him to trial. It is not
25 evidence of any kind against the defendant, nor does it permit

1 any presumption or inference of guilt. In other words, an
2 indictment is not consistent either with guilt or lack of
3 guilt. It simply puts that question at issue for your
4 decision. It is up to you to decide whether the government
5 has proved each element of the crimes alleged in the bill of
6 indictment beyond a reasonable doubt.

7 You are here to decide whether the government has
8 proved beyond a reasonable doubt that the defendant is guilty
9 of the crimes charged. The defendant is not on trial for any
10 act, conduct, or offense not alleged in the indictment.
11 Neither are you concerned with the guilt of any other person
12 or persons not on trial as a defendant in this case.

13 Every defendant in a criminal case is presumed to be
14 innocent and this presumption continues throughout the course
15 of the trial. This presumption will end only if you reach the
16 jury room and arrive unanimously at the conclusion, if you do,
17 that the government has shown to your satisfaction that the
18 defendant is guilty beyond a reasonable doubt.

19 This burden on the government does not change at any
20 time during the course of the trial. The presumption of
21 innocence in favor of a defendant is not a mere formality to
22 be disregarded by the jury at its pleasure. It is a
23 substantive part of our criminal law. Accordingly, the
24 government must prove each of the elements of the crimes
25 charged in this indictment beyond a reasonable doubt before

1 there can be a conviction.

2 The term "reasonable doubt" means just what it says.
3 It is a doubt based upon reason and common sense. Its meaning
4 is no doubt self-evident and understood by you and the Court
5 will not attempt to define it any further.

6 As I told you earlier in the trial, there are two
7 types of evidence from which a jury may properly assess in
8 determining whether the government has met its burden of proof
9 as to any offense. One is direct evidence, such as the
10 testimony of an eyewitness. The other is circumstantial
11 evidence. Circumstantial evidence is evidence of facts or
12 circumstances from which the existence or nonexistence of
13 other facts in controversy may be inferred. The law makes no
14 distinction between direct and circumstantial evidence but
15 simply requires that before convicting a defendant, the jury
16 must be satisfied of the guilt of the defendant beyond a
17 reasonable doubt from all of the evidence in the case.

18 While you should only consider evidence presented
19 during the trial of the case, you are permitted to draw such
20 reasonable inferences from the testimony and exhibits as you
21 feel are justified in the light of common experience. In
22 other words, you may make deductions and reach conclusions
23 which reason and common sense lead you to draw from the facts
24 which have been established by the testimony and evidence in
25 this case.

1 Certain of the government's exhibits included
2 transcripts. You'll recall the audio that also had
3 transcripts with it. You're instructed and reminded that
4 whether the transcripts correctly or incorrectly reflect the
5 content of the conversation or the identity of the speakers is
6 entirely for you to determine. You should make this
7 determination based on the testimony regarding the preparation
8 of the transcripts, your own comparison of the transcripts to
9 what you have heard on the recordings, and any other relevant
10 evidence or testimony. Should you determine that the
11 transcripts are incorrect or inaccurate in any respect, you
12 should disregard them to that extent.

13 You also heard evidence that the defendant made a
14 statement outside of court to two FBI agents. In determining
15 whether any statements claimed to have been made by the
16 defendant outside of court was knowingly or voluntarily made,
17 you should consider the evidence concerning such a statement
18 with caution and great care and should give such weight to the
19 statement as you feel it deserves under all of the
20 circumstances. You may consider in that regard such factors
21 as the age, training, education, occupation, and physical and
22 mental condition of the defendant, his treatment while under
23 questioning, and all the other circumstances in evidence
24 surrounding the making of the statement.

25 You are not required to accept testimony even though

1 the testimony is uncontradicted and the witness is not
2 impeached. You may decide because of the witness's bearing
3 and demeanor, or because of the inherent improbability of his
4 or her testimony, or for other reasons sufficient to you that
5 such testimony is not worthy of belief.

6 The testimony of a witness may be discredited or
7 impeached by showing that he or she previously made oral or
8 written statements which are inconsistent with his or her
9 present testimony. The earlier contradictory statements are
10 admissible only to impeach the credibility of the witness and
11 not to establish the truth of these statements. It is the
12 province of the jury to determine the credibility, if any, to
13 be given the testimony of a witness who has been impeached. I
14 don't recall impeachment testimony, but if you recall some,
15 that is the instruction to apply to it.

16 You also heard during the trial testimony of
17 witnesses who were recognized by the Court as experts in
18 particular fields. I will remind you that a person's training
19 and experience may give him specialized knowledge in a
20 technical field. The law allows that person to state an
21 opinion about matters in that particular field. Merely
22 because the witness has expressed an opinion does not mean,
23 however, that you must accept this opinion. The same as with
24 any other witness, it is up to you to decide whether you
25 believe his testimony and choose to rely upon it. Part of

1 that decision will depend on your judgment about whether the
2 witness's background, training, and experience is sufficient
3 to give the opinion that you heard. You must also decide
4 whether the opinions were based on sound reasons, judgment,
5 and information.

6 Your decision on the facts of this case should not
7 be determined by the number of witnesses testifying for or
8 against either party. You should consider all of the facts
9 and circumstances in evidence to determine which of the
10 witnesses you choose to believe and not believe.

11 The law does not require either the defendant or the
12 government to cross examine any witness. You may not draw any
13 inferences from the fact that the government or the defendant
14 did not cross examine a witness.

15 The defendant has elected not to testify in this
16 case. The Court instructs you that he has a constitutional
17 right not to take the stand and testify and not to speak at
18 all or offer any evidence, the burden of proof being entirely
19 upon the government. You must draw no adverse inferences of
20 any kind from his exercise of his privilege not to testify.
21 This right is a fundamental one in American criminal law and
22 one which cannot be disregarded by the jury at its pleasure.

23 The lawyers for both sides objected to some of the
24 things that were said or done during the trial. You may
25 recall that. This simply means that the lawyers were

1 requesting that I make a decision on a particular rule of law.
2 Do not hold that against either side. The lawyers have a duty
3 to object whenever they think that something is not permitted
4 by the rules of evidence. Those rules are designed to make
5 sure that both sides receive a fair trial. Do not draw any
6 conclusion from such objections. These relate only to the
7 legal questions that I must determine and should not influence
8 your thinking. If I sustain an objection, the witness was not
9 allowed to answer it. If I overruled the objection, the
10 witness was allowed to answer the question and you should
11 consider that answer as you would any other.

12 Let me emphasize that a lawyer's question is not
13 evidence. At times a lawyer may have incorporated into a
14 question a statement that assumes certain facts to be true and
15 asked the witness if the statement was true. If the witness
16 does not answer or denies the truth of the statement and if
17 there is no other evidence in the record proving that the
18 assumed fact is true, then you may not consider the fact to be
19 true simply because it was contained in the lawyer's question.

20 On the other hand, if the witness adopts or agrees
21 to the assumed facts in his or her answer, then the witness
22 may be considered to have testified to the facts assumed in
23 the question and his or her testimony is evidence of those
24 facts.

25 You may use your notes, if any, taken by you during

1 the trial. You are instructed that your notes are only a tool
2 to aid your own individual memory and should not be
3 substituted for your memory. If you chose not to take notes,
4 remember it was your individual responsibility to listen
5 carefully to the evidence. You cannot give this
6 responsibility to someone who did take notes. We depend on
7 the judgment of all members of the jury and you must all
8 remember the evidence in this case.

9 I will remind you that the punishment provided by
10 law for the offenses charged in the indictment, should there
11 be a verdict of guilt, is a matter exclusively within the
12 province of the Court and should never be considered by the
13 jury in any way in arriving at an impartial verdict as to the
14 guilt or lack of guilt of the accused.

15 All right. So -- and I know it's only 4:30, but the
16 closing arguments will take a little while and I don't like to
17 split them up, and we'll have time tomorrow to deal with all
18 of this. So I'm going to release you tonight. Should be the
19 last night where you'll have to put people off from wondering
20 how your day went. But, you know, we're getting close. So
21 please don't talk to anybody about this case. Don't let
22 anybody talk to you about it.

23 Don't start forming your opinions. The trial is
24 close to being over but it's not over. You need to hear the
25 closing arguments of the lawyers and you need to get what we

1 call the substantive instructions from the Court, the law that
2 applies specifically to these charges. And then when that's
3 over, you can retire to the jury room and begin forming your
4 opinions during your deliberations together.

5 So as always, leave your notes in the jury room and
6 we will see you tomorrow morning at 9:00.

7 Everyone remain seated while the jury clears the
8 floor.

9 JUROR NO. 13: What time do we come back tomorrow?

10 THE COURT: 9:00. Sorry if I didn't say that.

11 (Jury exited the courtroom.)

12 THE COURT: Just to be double clear, count two
13 applies to what has been referenced as the bathroom one video,
14 correct?

15 MR. ODULIO: Yes, Your Honor.

16 MR. CERVANTES: Would Your Honor like an exhibit
17 number reference?

18 THE COURT: Sure.

19 MR. ODULIO: Your Honor, Exhibit 1D.

20 THE COURT: All right. How long would counsel like
21 for closing arguments?

22 MR. ODULIO: Your Honor, we'd like one hour, please.

23 THE COURT: Mr. Ames?

24 MR. AMES: At least one hour, Your Honor.

25 THE COURT: Let me say this. My experience in the

1 four years since I've been on the bench is attorneys grossly
2 underestimate how long their arguments are going to take, but
3 I hold them to it every time. So I want to give you enough
4 time, but I am going to hold you to whatever we agree on. An
5 hour seems sufficient to me.

6 Mr. Ames, do you --

7 MR. AMES: I think that should generally be
8 sufficient. There's a lot of variables and different types of
9 things going on in the evidence here, but I think that should
10 be sufficient, Your Honor.

11 THE COURT: All right. I'll hold both sides to it.
12 Of course, the hour for the government includes their rebuttal
13 argument, which, again, in my experience gets short shrift
14 from the U.S. Attorney's Office in lots of trials. They leave
15 themselves about all of three minutes to do a rebuttal, which
16 I always think should be balanced the other way. But I'll
17 give each side an hour. I think that's plenty. You'll lose
18 the jury if you talk to them more than an hour. Now, I say
19 that even though I once gave a 5-1/2 hour closing, but there
20 was 72 counts and it was a 3-week trial. But an hour it is
21 and we'll start up with the government at that time.

22 Anything else we need to address tonight?

23 MR. ODULIO: Your Honor, there is, I think, the
24 issue of forfeiture, jury trial for forfeiture.

25 THE COURT: Yes. Thank you --

1 MR. ODULIO: And I think the inquiry is whether or
2 not the defendant wants a jury forfeiture should there be a
3 guilty verdict.

4 THE COURT: Yes. Thank you for reminding me of
5 that.

6 Mr. Ames.

7 (Counsel and defendant conferred.)

8 THE COURT: If you want to have the evening to talk
9 with him about it -- I mean, I don't know if he wants to make
10 a snap decision or not.

11 Mr. Tatum, the issue is if there is a guilty
12 verdict, then the forfeiture count in the indictment comes
13 into play and you're entitled to have the jury decide that
14 issue. It is often left to the Court to decide or there's
15 even a consent to forfeiture following a guilty verdict if
16 there is one. That's the issue we're talking about here.
17 I'll give you the evening to talk to Mr. Ames about --

18 MR. AMES: Thank you, Your Honor.

19 THE COURT: -- if there is a guilty verdict, what
20 you want to do with the forfeiture count.

21 MR. ODULIO: Nothing else from the government, Your
22 Honor.

23 THE COURT: Mr. Ames, anything else to do today?

24 MR. AMES: I don't think so, Your Honor, no.

25 THE COURT: The Court will be in recess until 9:00

1 tomorrow morning. Please remain here until the CSO let's
2 everyone know that the jury has cleared the floor, which I
3 hope there's still a CSO to tell us that. One of the counsel
4 can step out if you'd like to get confirmation you're not
5 going to get otherwise.

6 All right. We're in recess.

7 (Evening recess at 4:31 PM.)

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1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF NORTH CAROLINA
3 CERTIFICATE OF REPORTER
4
5

6 I, Cheryl A. Nuccio, Federal Official Realtime Court
7 Reporter, in and for the United States District Court for the
8 Western District of North Carolina, do hereby certify that
9 pursuant to Section 753, Title 28, United States Code, that
10 the foregoing is a true and correct transcript of the
11 stenographically reported proceedings held in the
12 above-entitled matter and that the transcript page format is
13 in conformance with the regulations of the Judicial Conference
14 of the United States.

15
16 Dated this 13th day of September 2023.
17
18

19 s/Cheryl A. Nuccio
20 Cheryl A. Nuccio, RMR-CRR
21 Official Court Reporter
22
23
24
25